TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN F. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

(19,301.)

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1 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Notice and Citation on Appeal.

The President of the United States to the Territory of Oklahoma or to J. C. Roberts, its attorney general and attorney of record in the above styled and numbered cause:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia within 30 days from the date of this writ and notice and on the first day of the October term of said court pursuant to an order allowing an appeal entered in the clerk's office of the supreme court of the Territory of Oklahoma on the 28th day of August A. D. 1903 wherein the said John T. New is the appellant and the said Territory of Oklahoma is the appel-ee to show cause if any there be why the judgment of the supreme court of the said Territory of Oklahoma and the judgment of the said district court of Washita county, Oklahoma Territory therein named, should not be reversed and set aside, and the said cause remanded to said district court of Washita county, Oklahoma Territory for a new trial.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this August 28th, A. D. 1903 and the Independence of the United States of America the 127th.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

2 TERRITORY OF OKLAHOMA, }
County of Logan. }

In the Supreme Court of the Territory of Okla.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210. Acceptance of Service, Service of Notice and Citation on Appeal.

I, J. C. Roberts the duly appointed and qualified attorney general of the Territory of Oklahoma and attorney of record for the said

defendant in error, The Territory of Oklahoma in the above styled and numbered cause wherein the said John T. New is plaintiff in error do hereby on behalf of said defendant in error, The Territory of Oklahoma accept the service of the within and foregoing notice and citation on appeal of said cause as full legal and complete, and hereby enter appearance for said Territory of Oklahoma, defendant in error.

Witness my hand this 28th August, A. D. 1903.

J. C. ROBBERTS,
Attorney General for the Territory of Oklahoma and Attorney of Record for Territory of Oklahoma in the Above Styled and Numbered Cause.

Filed Aug. 28, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

3 [Endorsed:] No. 1210. John T. New, plaintiff in error *versus* Territory of Oklahoma, defendant in error. Notice and citation on appeal and acceptance of service of same. Filed Aug. 28, 1903. Benj. F. Hegler, clerk supreme court.

4 TERRITORY OF OKLAHOMA, *County of Logan,* } *ss:*

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Petition for Appeal.

To the honorable supreme court of Oklahoma Territory, Hon. John H. Burford, chief justice of the supreme court of Oklahoma Territory:

John T. New the petitioner, alleges that he is a citizen of the United States of America and of the Territory of Oklahoma. That heretofore to-wit, on the — day of May A. D. 1901, he was indicted by the grand jury in the territorial district court of Washita county, Oklahoma Territory, charged with the crime of murder of one H. F. Doyle, that thereafter upon the trial of said cause at the October term A. D. 1901 of said court in the said Washita county, there was rendered against him by said district court a judgment of conviction of murder as charged in the indictment, and penal sentence of imprisonment in the territorial penitentiary for life based upon a jury verdict rendered by the jury at said trial.

That thereafter the defendant duly and legally appealed from said judgment of said district court of Washita county to the supreme court of said Oklahoma Territory; which said appeal was heard and said cause adjudged by said supreme court of Oklahoma Territory on the second day of September A. D. nineteen hundred and two, by which said judgment of the supreme court of Oklahoma Territory rendered and entered on the day and date last aforesaid the said judgment and sentence of said district court of said Washita county, Oklahoma Territory, was affirmed.

5 And whereas the petitioner, the said defendant John T. New, feels aggrieved at said judgment of the supreme court of Oklahoma Territory, and desires and now prays to appeal therefrom to the Supreme Court of the United States of America. Your petitioner avers that the supreme court of Oklahoma Territory committed prejudicial error against him in not reversing the said judgment of the district court of Washita county, Oklahoma Territory, and in not remanding the defendant's said cause to said district court of Washita county, Oklahoma Territory, for a new trial because of the grave, fundamental and prejudicial errors committed by said district court of Washita county at defendant's aforesaid trial and conviction in said cause; which errors in said trial court upon defendant's said trial your petitioner the said defendant assigns as follows:

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error.

Assignment of Errors.

First assignment of error.

The trial court erred in refusing to give in charge to the jury special instruction number five requested by the defendant, which refusal was at the time excepted to and which special requested instruction was as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt, as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument then it is your duty to acquit the defendant.", which said requested instruction correctly stated the rule of law applicable to the evidence in the case and was demanded by said evidence.

6 Second assignment of error.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to in-

struct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

Third assignment of error.

The trial court erred in the 19th section of the instructions to the jury in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety and could have gone away from the scene of action with safety to his life and person and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty when threatened and approached in a threatening manner upon his own premises to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and
7 circumstances in evidence" before the jury.

Fourth assignment of error.

The trial court erred in instructing the jury in section number 15½ of the instructions as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man the law will not justify the killing on the ground of self-defense," to which instruction to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First it does not state correctly the rule of law, and second it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

Fifth assignment of error.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language "at the same time the fatal shot in this cause was fired by the defendant," and also in said instructions using the following language "before the fatal shot was fired," thereby invading the province of the jury whose duty it was and not that of the trial judge to determine the issue as to how the deceased came to his death and as to whether deceased came to his death in the manner charged in the indictment.

8 Sixth assignment of error.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant: "first special instruction requested by the defendant — as follows:

TERRITORY
vs.
NEW. } No. 1.

At the request of the defendant the court instructs the jury as follows:

The jury are instructed as a matter of law that if a person believes and has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears, upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation (" if necessary ") and given.

Interlineation excepted to by defendant. C. F. I. judge.

" complained of in parenthesis.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parenthesis "if necessary" in said special instruction and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which action and rulings of the court the defendant duly excepted at the time.

9 Wherefore the defendant John T. New your said petitioner prays that he be granted and allowed an appeal to the said Supreme Court of the United States of America and that the clerk of the supreme court of Oklahoma Territory be directed to transmit to said Supreme court of the United States a certified copy of the record and case made on appeal, and now on file in this court, under the style of number — John T. New, plaintiff in error, *versus* The Territory of Oklahoma, defendant in error, together with the assignment of error above set forth, and this day filed in said cause, and for such other and further orders and proceedings as shall duly and legally perfect the appeal of your petitioner the said defendant John T. New from the decision of the supreme court of Oklahoma Territory to the Supreme Court of the United States of America.

This August 25th, 1903.

And your petitioner further prays that upon said appeal in the Supreme Court of the United States of America that the Supreme Court of the United States of America do vacate, reverse and set aside said judgment of the supreme court of Oklahoma Territory and said judgment of said territorial district court of said Washita county, Oklahoma Territory, and remand said cause for a new trial to said territorial district of Washita county, Oklahoma Territory

JOHN T. NEW,
Plaintiff in Error.
C. L. HERBERT,
T. G. CHAMBERS,
CULP & GIDDINGS,
Attorneys for Plaintiff in Error.

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in error—Petition of John T. New, defendant and plaintiff in error, for appeal.—Filed Aug. 28, 1903, Benj. F. Hegler, clerk supreme court.

10 In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error, } No. 1210.

Assignment of Errors.

First assignment of error.

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Second assignment of error.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

11 Third assignment of error.

The trial court erred in the 19th section of the instructions to the jury in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts, and circumstances, in evidence in the case, you believe beyond a reasonable doubt that the defendant New, could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person, and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and nece sary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

Fourth assignment of error.

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"The court instructs the jury that if a man kills another through

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12 ground of self defense" to which instructions to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First, it does not state correctly the rule of law, and second, it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

Fifth assignment of error.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language, "at the same time the fatal shot in this cause was fired by the defendant," and also in said instruction using the following language "before the fatal shot was fired," thereby invading the province of the jury whose duty it was and not that of the trial judge to determine the issue as to how the deceased came to his death, and as to whether deceased came to his death in the manner charged in the indictment.

Sixth assignment of error.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant, first special instruction requested by the defendant being as follows:

TERRITORY
vs.
NEW. } No. 1.

At the request of the defendant, the court instructs the jury as follows:

The jury are instructed as a matter of law that if a person believes and has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and
13 the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation (" if necessary ") and given.
Interlineation excepted to by defendant.—C. F. I. judge.
" complained of in parentheses.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parentheses " if necessary " in said special instruction, and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which action and rulings of the court the defendant duly excepted at the time.

JOHN T. NEW,
Plaintiff in Error.
C. L. HERBERT,
CULP & GIDDINGS,
T. G. CHAMBERS,
Attorneys for Plaintiff in Error.

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma—Assignments of errors—Filed Aug. 28, 1903—Benj. F. Hegler, clerk supreme court.

14 TERRITORY OF OKLAHOMA, }
County of Logan. }

In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,	No. 1210. Order Allowing Appeal from the Supreme Court of Oklahoma Territory to the Supreme Court of the United States of America.
vs.	
THE TERRITORY OF OKLAHOMA, Defendant Error.	

Upon the motion and application of T. G. Chambers, counsel for plaintiff in error, John T. New, and upon the filing of the petition of said John T. New for an appeal, together with the filing and presentation of the assignment of errors, and it appearing from said petition and from the record and case made now on file in the supreme court of Oklahoma Territory that the said plaintiff in error and petitioner John T. New is under sentence for the remainder of his natural life at hard labor in the territorial prison of Oklahoma Territory under a judgment and sentence of the district court of Washita county, Oklahoma Territory, upon a conviction under an indictment for murder the penalty and sentence of which might have been death, which said judgment and sentence of said territorial district court of said Washita county, Oklahoma Territory, was an appeal on the second day of September A. D. 1902, affirmed by the supreme court of Oklahoma Territory, and it further appear-

ing that the petition of said John T. New for an appeal is filed in due and legal time and is in all things regular and proper, it is therefore hereby ordered, considered and decreed by the supreme court of Oklahoma Territory that the prayer of said petitioner, John T. New, be granted and that an appeal be and the same is hereby allowed said petitioner John T. New, from the final judgment of this court in his said cause rendered on September second, A. D. 1902, to the Supreme Court of the United States of America, and that the clerk of this court be and he is hereby directed to make and transmit to the Supreme Court of the United States at
15 Washington, District of Columbia, a certified transcript ofall records and proceedings in this court in the said cause fi ed, entered or rendered including the original record and case madl on the appeal, the petition for appeal, assignment of errors, this order for allowing an appeal, and all other proceedings by this court had in said cause. This August 28th A. D., 1903.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in error—Order of the supreme court of Oklahoma, allowing appeal to the Supreme Court of the United States of America.—Filed Aug. 28, 1903, Benj. F. Hegler, clerk supreme court.

16 In the Supreme Court, Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Petition in Error.

The said plaintiff in error complains of the said defendant in error for that the said defendant in error at the regular October term A. D. 1901 of the district court for Washita county, Territory aforesaid, recovered a judgment against said plaintiff in error by the consideration of said court, in a certain action then pending in said court wherein the defendant in error was plaintiff and plaintiff in error was defendant, a copy of the record of the judgment and proceedings in which case, duly certified and authenticated is hereto attached, marked "A" and made a part hereof; and plaintiff in error avers that there is error in said judgment, record and proceedings in this, to-wit:

First. That the said court erred in instructions given to the jury.

Second. That the said court erred in refusing to give instructions asked by the plaintiff in error.

Third. That the said court erred in modifying changing, and altering instructions asked by the plaintiff in error, and in giving them in their changed, altered and modified form.

Fourth. That the said court erred in admitting illegal and incompetent testimony over the objection of defendant below.

Fifth. That the said court erred in rejecting legal and competent evidence offered by defendant below.

17 Sixth. The said court erred in overruling the motion of the plaintiff in error for a new trial.

Seventh. That the said court erred in rendering judgment against plaintiff in error when it should have been given for plaintiff in error according to the law of the land.

Wherefore plaintiff in error prays this honorable court that said judgment be set aside, reversed and that he be restored to all things he has lost by reason thereof, and for costs.

HENRY M. FURMAN AND
FORREST AND LOWE,
Attorneys for Plaintiff in Error.

Filed Mar. 18, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By FLORENCE N. WEIRICK, *Deputy.*

18 In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Case-made. No. 317.

EXHIBIT A TO PETITION IN ERROR.

Filed Mar. 18, 1902. Benj. F. Hegler, Clerk Supreme Court, by Florence N. Weirick, Deputy.

In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Case-made.

Be it remembered, that heretofore, on the respective dates as hereinafter set out, proceedings were had in the above entitled cause, as follows, to-wit:

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, }

In said District and Territory.

In the matter of drawing the grand and petit jurors within and for the county of Washita, district and Territory aforesaid, for the regular May term, 1901, thereof.

Order.

To the clerk of said district and Territory:

You are hereby commanded to proceed at once to have drawn and summoned 50 persons possessing the qualifications of jurors,
19 according to law, to serve as such in the district court of Washita county, district and Territory aforesaid, for the regular May term, 1901, and place the venire therefor in the hands of the sheriff of said county for service; said venire to command said persons therein contained to be and appear before the district court at Cordell, in the county of Washita, in said district and Territory, on the 6th day of May, 1901, at 9 o'clock a. m. of said day without fail.

It is further ordered, that the first 20 persons so drawn shall be inserted in a venire to be served as grand jurors, and the remaining names so drawn shall be inserted in a venire and served as petit jurors.

Witness my hand at El Reno, Okla., this 19th day of April, 1901.

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

And afterwards, to-wit, on the 22nd day of April, 1901, pursuant to the above and foregoing order, comes John W. Miller, the duly elected, qualified and acting sheriff of said county, and G. D. Coker, the duly elected, qualified, and acting clerk of said county, having in his possession and custody the jury box of said county, and together with G. E. Wagner, the duly appointed, qualified, and acting deputy district clerk of said county, in the district clerk's office, proceed in due form, agreeable to said order, to draw the grand and petit jurors for the regular May term, 1901, of the district court of said county; and now the said box having been thoroughly shaken and placed so that the contents are invisible by the said officers, and each of said officers proceed to draw alternately therefrom a ballot until the number required by said order is complete, in the following order, to-wit:—J. D. Stewart, J. B. Pryor, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. H. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines,

T. J. Freeman, J. L. Joiner, T. H. Lear, E. D. Rickey, Enoch
20 Jarrell, L. L. Reeve, P. W. Franzen, M. D. Chappelear, Albert Ryan, C. E. Rogers, George Nisle, Philip Schones, J. P. Whittaker, George Loomis, D. Cone, Charley Smith, John Odle, W. F. Chester, J. M. Wheeler, John Bose, Fred R. Kern, O. E. Davis, Clay Thompson, P. H. Buller, D. F. Hollis, W. J. Russell, T. E. Taylor, C. H. Murdock, D. D. Schapansky, Charles Bargley, W. D. Williams, W. F. Schultz, J. H. Maddox, J. H. Farris, Frank Algrim, G. W. Curry, F. R. Burns, and E. Fields.

Whereupon the clerk of said district inserts the first 20 names so drawn in a venire to be served as grand jurors, and the remaining names so drawn, in a venire to be served as petit jurors, and the said ballots are in the presence of said officers destroyed by burning.

And afterwards on the 30th day of April, 1901, comes said sheriff and makes return of the petit jury venire in words and figures *and* as follows, to-wit:

"Received this writ on the 22nd day of April, 1901, and served the same on the within named Albert Ryan, George Nisle, Philip Schones, J. P. Whittaker, W. F. Chester, J. M. Wheeler, George Loomis, John Bose, Fred R. Kern, J. D. Cone, O. E. Davis, Charley Smith, *L*ohn *P*dle, Clay Thompson, P. H. Buller, W. J. Russell, T. E. Taylor, C. H. Murdock, D. D. Schapansky, W. D. Williams, W. F. Schultz, J. H. Maddox, J. H. Farris, Frank Ahlgrim, G. W. Currey, F. R. Burns, and E. Fields, by delivering to them a certified copy of the same. C. E. Rogers, D. F. Hollis, and Charles Bargsley not found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 4th day of May, 1901.

E. M. HEGLER,
District Clerk,
[SEAL.] By G. E. WAGNER, *Deputy.*

21 And afterwards, to-wit, on the 4th day of May, 1901, *and* makes return of the grand jury venire in words and figures as follows, to-wit:

"Received this writ on the 22nd day of April, 1901, and served the same on the within named J. D. Stewart, J. B. Prior, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. W. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, T. J. Freeman, T. L. Lear, E. D. Rickey, Enoch Jarrell, L. L. Reeve, P. W. Franzen, M. D. Chappelear, by delivering a certified copy of the same to them. J. L. Joiner could not be found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 4th day of May, 1901.

[SEAL.] E. M. HEGLER,
District Clerk.
G. E. WAGNER, *Deputy.*

And afterwards on the 4th day of May, 1901, comes the sheriff and county clerk of Washita county, Okla., said clerk having in his possession the jury box of said county and together with the district clerk of said county proceed to draw four names to complete the grand and petit jury panels as heretofore ordered. And now said jury box is thoroughly shaken and placed in such a position as to conceal the contents and thereupon each officer draws alternately a name therefrom till said number is complete in the following order, to-wit: H. G. Westbrook, E. E. Simms, Dan Anderson, and W. G. Armstrong. Whereupon the first name so drawn is inserted in a grand jury venire and the remaining names in a petit jury venire and said venires are placed in the hands of said sheriff for service and the ballots containing said names are destroyed by burning.

And afterwards, to-wit, on the 6th day of May, 1901, comes the said sheriff and makes return of the second grand jury venire in the following language, to-wit:

"Received this writ on the 4th day of May, 1901, and served the same on the within named H. G. Westbrook by delivering to him a certified copy of the same.

JOHN W. MILLER, *Sheriff.*

22 Subscribed and sworn to before me this 6th day of May, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards on the 6th day of May, 1901, comes said sheriff and makes return of the second petit jury venire as follows:

"Received this writ on the 4th day of May, 1901, and served the same on the within named W. L. Armstrong, Dan Anderson and E. E. Simms, by delivering to them a certified copy thereof.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 6th day of May, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA,
Second Judicial District, County of Washita.

Be it remembered, that on the sixth day of May, 1901, the same being the first judicial day of the regular May term, 1901, of the district court in and for said county, district, and Territory, the following proceedings among others were had, to-wit:

Court convened in regular session for the May term, 1901, pursuant to an order of the supreme court heretofore made and entered, for the county of Washita, in said district and Territory.

Present and presiding, Hon. C. F. Irwin, judge; E. M. Hegler, clerk; John W. Miller, sheriff; T. R. Jackson, crier and T. F. Millikan, reporter.

By order of the court public proclamation opening court for the actual transaction of business was made, and the following proceedings were had, to-wit:

23 *Empanelling Grand Jury.*

In the matter of empanelling the grand jury within and for the county of Washita, second district, Oklahoma Territory, for the regular May term, 1901.

And now comes the following persons heretofore drawn and summoned to serve as grand jurors into open court and answer present to roll call, to-wit: J. D. Stewart, J. B. Pryor, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. H. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, H. G. Westbrook, T. H. Lear, E. D. Rickey, L. L. Reeve, P. W. Franzen, M. D. Chappelear, Enock Jarrell, whereupon said persons are sworn to true answer make touching their qualifications as jurors, and are examined by the court and for good cause shown the court excuses for the term, W. Crawford, H. W. Cuffell and L. L. Reeve, and the clerk is ordered to issue certificates to said persons and take their affidavits as to *per diem* and mileage, and the following person- being found qualified are accepted by the court, to-wit:

J. D. Stewart, J. B. Pryor, W. H. Cleveland, J. G. Huckaby, W. H. Reed, John Cresswell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, H. G. Westbrook, T. H. Lear, E. D. Rickey, Enock Jarrell, P. W. Franzen, M. D. Chappelear.

Whereupon all prisoners in custody of the sheriff are brought into court and they and all persons on bond awaiting action of this grand jury and the Territory are notified in open court of their right of challenge to said jury or any member thereof, and none being interposed the court duly charges said jury, a bailiff is appointed and sworn to wait on said jury, which now retires to consider of such

matters as may properly come before them. Ordered that court stand adjourned till tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

24 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

Be it remembered, that on the 7th day of May, 1901, the same being the second judicial day of the district court in and for said county, district and Territory, for the regular May term, 1901, thereof in the district court in and for said county, district and Territory aforesaid, after same had been duly opened for the actual transaction of business the following proceedings among others were had, to-wit:

In re return of grand jury.

Comes now the grand jury into open court and answers present to the call of their names and all jurors being present the said jury by and through their foreman present two (2) indictments, which the court orders filed and numbered. And now the clerk in open court and in the presence of said jury files said indictments and numbers them Nos. 316 & 317 respectively, and said jury having further business before them, retire to consider thereof.

Ordered that court stand adjourned till to-morrow morning at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

Indictment No. 317 is in words and figures as follows, to-wit:

25 Original.

Indictment, District Court.

In District Court, Washita County.

TERRITORY OF OKLAHOMA }
vs.
JOHN NEW, Defendant. }

Of the May term of the district court of the second judicial district of the Territory of Oklahoma, within and for Washita county in said Territory, in the year of our Lord one thousand nine hundred and one, the grand jurors, chosen, selected, empanelled and sworn, in and for the county of Washita, in the name and by the authority of the Territory of Oklahoma, upon their oaths present that John New, late of the county aforesaid, on the thirteenth day of April, in the year of our Lord one thousand nine hundred and one,

in the county of Washita and Territory of Oklahoma, aforesaid, did purposely, wilfully and feloniously, with malice aforethought, and without authority of law, and with a premeditated design then existing in the mind of the said John New, to effect the death of H. F. Doyle, then and there with a certain Winchester rifle loaded with gunpowder and divers leaden bullets, shoot a bullet into the body of him the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of said H. F. Doyle, of which mortal wound, so inflicted and so made, in the manner and form, and with the purpose aforesaid, the said H. F. Doyle, on said 13th day of April, one thousand nine hundred and one, and in said Washita county aforesaid, did die, as was by the said John New intended as aforesaid he should do, and so the grand jurors aforesaid, on their oaths aforesaid, do say and find that the said John New, in manner and form aforesaid and by the means aforesaid, did then and there purposely, wilfully, and feloniously, and of his malice aforethought, and without authority of law, and with the premeditated design to effect the death of him, the said H. F. Doyle, the said H. F. Doyle did kill and murder contrary to the form of the statute in
26 such case made and provided and against the peace and dignity of the Territory of Oklahoma.

T. A. EDWARDS,
County Attorney.

Endorsed on the back as follows:

Witnesses, W. A. Reeves, G. B. Trotter, Mrs. G. B. Trotter, James Lightfoot, T. J. Hampton, Al Kits, George Austin, Charles Trotter, Maria Doyle, Pat Primm, James Walker, Rose Primm, Charles Murray, H. W. Fitchett, Mr. King, James Blocker, Dr. McLain, Wallace King, J. M. Baker, J. W. Miller, Mr. Wilson, Mr. Stapp, Thos. J. Bryan, J. B. Cannon, Mrs. J. B. Cannon, Levi Primm, Jack Primm, James Berky, John Farris, Jewel Alexander, Wm. Campbell, Mr. Waldruff, John Haggard, W. L. Reeves, Solon Reeves. T. A. Edwards, county attorney.

317. Indictment. District court. Washita county. Territory of Oklahoma *vs.* John New, defendant. Indictment for murder. A true bill. W. H. Cleveland, foreman of the grand jury. Filed and presented in open court in presence of grand jury, May 7, 1901, by E. M. Hegler, deputy clerk. Rec'd aps. dt. Rec. p. 69, G. E. Wagner, dep. cl'k.

TERRITORY OF OKLAHOMA,
Second Judicial District, County of Washita, } ss:

Be it remembered, that in the district court of Washita county, second judicial district, Territory of Oklahoma, on the 8th day of May, 1901, the same being the third judicial day of the district court in and for said county, district and Territory, of the May term, 1901, thereof, after said court had been duly open- for the actual transac-

tion of business, the following proceedings among others were had, to-wit:

27 TERRITORY OF OKLAHOMA } vs. JOHN NEW. } #317.

Comes defendant in the custody of the sheriff into open court and is arraigned, the indictment read to him, and he states his true name as therein contained, waives statutory time to plead, and enters a plea of not guilty.

It is thereupon considered and ordered by the court that said cause be and hereby is set for trial Friday of this week, May 10th, 1901.

C. F. IRWIN, *Judge.*

Ordered that court stand adjourned till tomorrow morning at 9 o'clock, a. m.

C. F. IRWIN, *Judge.*

TERRITORY OF OKLAHOMA, *Second Judicial District, County of Washita,* } ss:

Be it remembered, that in the district court in and for the county of Washita, second judicial district, Oklahoma Territory, on the 10th day of May, 1901, the same being the fifth judicial day of the district court in and for said county, district and Territory, of the May term, 1901, thereof, after said court had been duly open- for the actual transaction of business, the following proceedings among others were had, to-wit:

28 TERRITORY OF OKLAHOMA } vs. JOHN NEW, Defendant. } No. 317.

Comes now the Territory by its attorneys and defendant in person and by his attorneys into open court. And now the Territory announces ready for trial and the defendant by his attorneys files his motion supported by affidavits for a continuance, which said motion is presented to the court, and the court being duly advised in the premises sustains said motion and grants said continuance, said motion and affidavits follow this page.

TERRITORY OF OKLAHOMA } vs. JOHN NEW. } No. 317.

It appearing to the satisfaction of the court that the jail of this county is insecure and in a poor sanitary condition and that the

above named defendant is in a serious physical condition and at the request of the county attorney,

It is therefore ordered, that the sheriff of this county forthwith transport said defendant to Canadian county, Oklahoma Territory, and deliver him to the sheriff of said county and take his receipt therefor.

It is further ordered, that the sheriff of Canadian county shall receive and confine said defendant in the county jail of said county until the further order of this court, and a certified copy of this order shall be his full warrant and authority for so doing.

C. F. IRWIN, *Judge.*

Ordered that court stand adjourned till Wednesday, May 15th, 1901, at 1.30 p. m.

C. F. IRWIN, *Judge.*

29 In the District Court of Washita County, Oklahoma.

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Now comes the defendant and says he is not ready for trial, and cannot get ready for trial at this term of the court, and moves the court to continue this cause to the next term of the court, for the reasons set forth in the affidavits hereto attached.

H. M. FURMAN,
R. B. FORREST,
S. C. MASSINGALE,
Att'ys for Defendant.

TERRITORY OF OKLAHOMA,
Washita County.

In the District Court within and for the said County.

TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.

Affidavit.

TERRITORY OF OKLAHOMA,
Washita County, ss:

R. B. Forrest, being first sworn in due form of law, upon his oath, deposes and says, that he is one of the attorneys employed to defend the above entitled action; that his employment dates from Tuesday,

the 7th day of May, 1901, that since said employment, this affiant has been almost constantly engaged in his duties as the attorney of several other litigants who have actions pending in the present term of this court, and he has, by reason of his required attention, to the said matters, had scarcely any time whatever to make preparation for the trial of this case; that he has been unable to have a conference with the defendant, both on account of his engagements in said other matters, above referred to, and on account of the confinement and the physical condition of the defendant, which
30 said physical condition, affiant is informed by reputable physicians, is such that the safety of defendant's health requires that he should not be brought to any mental strain, and affiant states that the only opportunity he has had to see and speak with the defendant up to the present time since his employment was on the occasion when the defendant was brought into court to be arraigned in this action. Affiant further states that his engagements above referred to with other matters to which his attention has been confined, in order that he might be enabled to attend to duties connected therewith, when the same should come before the court, has prevented affiant from opportunity to enter upon a careful and studious consideration of the matters of this case with his co-counsel herein. That he has had no opportunity to investigate the case, owing to the shortness of the time since his employment, and his professional engagements in connection with such other matters as he has herein referred to.

Affiant further states that he is informed by his co-counsel, from whom he has learned all that he knows about this case, that the difficulties existing between the defendant and the deceased have covered a series of years, and that the persons who are familiar therewith are located at different places within the State of Texas, and in the Territory of Oklahoma, and possibly elsewhere.

That the defense in this action will be that the defendant slew the deceased in the defense of his own life, that the deceased had made threats against the life of the defendant, on numerous occasions and at different places, that he had aggravated and worried the defendant, and threatened his life to such a degree that the defendant believed that his own life was in peril when he met the deceased, and at the time of the fatal hour. That to establish the defense it is essential that affiant and his co-counsel, should see and talk with the witnesses, who will be relied upon to establish this defense. That owing to the facts and circumstances herein stated and affiant's total inability to prepare for said trial, for the
31 reasons stated, this affiant is wholly unprepared to enter upon the defense of this case, at the present term of this court. And affiant states that he is aware of the fact that his co-counsel herein are also unprepared to enter into the trial of this case, at the present term of this court.

Affiant further states that the defendant and his friends are anxious that this case should be brought to a speedy trial, but

owing to facts herein stated, the case could not be tried at this term of the court, without injustice to the defendant. Affiant further states that this affidavit is not made for the purpose of delay, but that justice may be done. Further affiant saith not.

R. B. FORREST.

Subscribed and sworn to before me this 10th day of May, 1901.

E. M. HEGLER, *Clerk.*
[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Washita County, }

Personally appeared Henry M. Furman, who being duly sworn deposes and says, that he is of counsel employed to defend John T. New, upon the charge of murder now pending against him in the aforesaid Territory and county.

That he was employed to defend said New on the 7th day of the present month, that he at once had an interview with said New, for the purpose of getting ready to try cause, that he found said New in an exceedingly debilitated condition, both of body and mind; that affiant is informed by the said New and by the physicians who have attended him, that said New is just recovering from an attack of pneumonia, from which the said New has been suffering ever since the day after the commission of the homicide, with which the said New now stands indicted. Affiant states that he experi-
32 enced the greatest difficulty in obtaining from the said New an intelligent and connected statement of the facts of this cause; that affiant conversed with said New for about three hours before he could gather sufficient information to enable him to understand the merits of this case; that owing to the enfeebled condition of the mind and body of the said New it is impossible for the said New to keep his mind continuously upon any one subject.

That affiant in good faith believes if this cause is tried at the present term of the court the said New is not in such a mental and physical condition as will enable him to take the witness stand and testify in his own behalf. That affiant has been forbidden by reputable physicians who have examined said New from placing said New on the witness stand, at the present term of the court upon the ground that any undue excitement at this time to said New will be attended with the most serious consequences to him, and also upon the further ground that the said New is not in such a frame of mind owing to his said sickness, as would enable him to be a witness in this case.

Affiant says that the testimony of said New is material to the defense of said cause, in this, if said New, if able to take the witness stand would testify that the difficulty which resulted in the death of deceased, was of long standing; that said difficulty began in the

State of Texas, several years ago and that said New would testify to a number of transactions between deceased and himself and to a number of things said by deceased to said New which would be material to show the state of mind existing on the part of deceased, toward the defendant, and from which defendant would have reasonable ground to apprehend that it was the intention of deceased to kill defendant. That owing to the condition of the mind of the said New he is unable to give a statement of these facts in detail and therefore affiant is unable to give them. That said New was unable to state the names of all the witnesses by whom he could
33 prove said facts in detail.

Affiant says that among the more important facts stated to him by the said New was that said New was in Texas a short time prior to the homicide and that while there he was informed by a number of persons that deceased was in Texas during the month of December, 1900, and that while in Texas deceased had repeatedly threatened to kill this defendant, and had stated to a number of persons that such was his purpose and intention, and in connection with said threats, deceased applied the vilest epithets to the defendant. That said threats were communicated to this defendant when in Texas, by W. A. Powers, and divers other persons, who reside in said State, and that from said threats the defendant had reasonable ground to believe, and in good faith did believe, that it was the purpose and intention of deceased to take the life of defendant. That all of said witnesses reside without the jurisdiction of this court and in Collin county, Texas, and other portions of said State, and that owing to the shortness of time since the filing of this indictment, and before the expiration of this term of the court, counsel for defendant have been unable and will be unable to investigate said matters and prepare to take the depositions of said witnesses. That if this cause is tried at the present term of this court the defendant will be deprived of said evidence which is material to the defense of this cause.

Affiant further states that if said New was in a physical and mental condition to take the witness stand he would testify in substance that immediately prior to the time of the homicide, this defendant was on his own land where he had a right to be, and was attending his own business repairing a fence around his farm. That this defendant did not see deceased until he chanced to look down the road, passing his fence where he saw deceased, and one Reeves, coming toward where defendant was in a wagon. That said Reeves and deceased appeared so recognize defendant at the same
34 moment. That deceased immediately placed his right hand in his bosom, as though to draw a pistol. That the defendant in view of the threats that had been previously made, communicated to him, had reasonable ground to believe and in good faith did believe from the conduct of deceased that deceased then and there intended to kill defendant. That thereupon the defendant picked up a Winchester rifle, which he had with him, and fired at deceased.

That at the time defendant fired the shot, deceased had his right hand in his bosom, and appeared to be attempting to draw a pistol. That when defendant fired deceased jumped out of the wagon, but still kept his said hand in his bosom and appeared to be making a desperate effort to draw a pistol. That defendant expecting deceased to draw his pistol at any moment and believing in good faith that his life was in danger at hands of deceased, continued to fire at deceased until the fatal wounds were inflicted upon deceased. Defendant says that he is informed that the Government witnesses will testify that a pistol was found on deceased, pinned in his bosom in such a manner as required considerable effort upon the part of said Government witness to get said pistol away from body of deceased. Affiant says that the testimony of New in his own behalf is necessary because affiant is informed and believes that the Government's witness, Reeves will swear that the deceased did not attempt to draw his pistol, and did not make any hostile demonstrations towards defendant at the time of the homicide. Affiant further says that defendant cannot safely go to trial at this term of court because counsel for defendant were on the 9th day of May, 1901, served by the county attorney with the following list of witnesses to be used by the prosecution, to-wit: Green Trotter, Mrs. Trotter, Chas. Trotter, Dick Reeves, James Lightfoot, Ben Lightfoot, Maria Doyle, Patt. Prim, James Walker, Rose Primm, Chas. Munoy, George Rustin, A. Kitts, H. W. Fitchett, Mrs. and Mr. King, J. S. Blocker and Dr. McClain; that said witnesses are stangers to counsel for defendant, with one or two exceptions,

35 and that owing to the mental and physical condition of the defendant, counsel for defendant are unable to learn from him what will probably be the testimony of said witnesses, and that owing to the shortness of time counsel for defendant have been unable to learn what said witnesses will swear to, or to make any investigation as to the credibility of said witnesses, or their animus towards defendant, and that if said cause proceeds to trial at this term of the court, counsel for defendant will be largely groping in the dark, as to what they are called upon to defend against, and that therefore they will necessarily be unprepared to make a defense in this cause.

That counsel for defense has received information with reference to a number of matters which they believe to be material to the defense in this cause, but which, from the shortness of time, they have been unable to investigate and verify.

Affiant further states that both defendant and his counsel are in good faith anxious to try this cause at the earliest possible moment, and that they confidently believe that if this cause is continued to the next term of the court they will then be ready for trial, and will then be able to make a successful defense to this indictment. That this application for a continuance is not made for delay, but that justice may be done.

HENRY M. FURMAN.

Subscribed and sworn to before me this 10th day of May, 1901.

E. M. HEGLER,
Dist. Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

Personally appeared Dr. W. A. Evans, Dr. Ney Neal, and Dr. W. J. Hancock, who being duly sworn each for himself swears, that he is a regular practicing physician under the laws of Oklahoma Territory, and that the three together have this day carefully examined John T. New, now confined in the jail of Washita county, upon the charge of murder. That the said New is now in a very pre-
36 carious state of health. He is just recovering from an attack of pneumonia, which had been preceded by attacks of lagrippe and measles. He is now suffering with a serious bowel trouble, his vitality is very low, from his condition we are of the opinion that he is nearly verging on insanity, and that in justice to his health and also the merits of his case, it would be unsafe to place him upon trial. We do not believe that he is in condition to testify as a witness in an intelligent and reliable manner and we greatly fear that the excitement and strain of a trial would be attended with the most serious results to him.

W. A. EVANS, M. D.
NEY NEAL, M. D.
W. J. HANCOCK, M. D.

Subscribed and sworn to before me a notary public, in and for Washita county this 8th day of May, 1901.

[SEAL.] H. L. ROWLEY,
Notary Public.

My com. expires June 7, 1904.

Endorsed on the back: Territory of Oklahoma, *vs.* John T. New—Application of defendant for a continuance / Filed May 10, 1901. E. M. Hegler, clerk, G. E. Wagner, dep.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court, Oklahoma Territory, January Term, 1901.

Order Fixing Terms of Court for the Various Counties of the Second Judicial District.

Ordered by the court: That terms of the district courts for the various counties of the second judicial district, Territory of Oklahoma, be fixed as follows, to-wit:

For the county of Kingfisher, at Kingfisher, Monday, Feb. 11th, 1901.

For the county of Canadian, at El Reno, Monday, March 4th, 1901;

For the county of Cleveland, at Norman, Monday, April 15th, 1901;

37 For the county of Washita, at Cordell, Monday, May 6th, 1901;

For the county of Custer, at Arapahoe, Monday, May 20th, 1901.

It is further ordered by the court: That the clerk transmit a certified copy of this order, attested by his official signature and the seal of this court, to each of the district courts of the Territory and to the United States attorney and the United States marshal.

JNO. H. BURFORD,
Chief Justice.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order made by said supreme court on the 9th day of January, 1901, fixing terms of court for the second judicial district of said Territory, as the same appears on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Guthrie, this 14th day of January, 1901.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

38 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court.

Order Fixing Terms of Court for the Second Judicial District.

Ordered by the court: That terms of district courts for the second judicial district of Oklahoma Territory, be fixed as follows, to-wit:

For the county of Custer, at Arapahoe, Monday, Sept. 30, 1901.

For the county of Washita, at Cordell, Tuesday, October 15th, 1901.

For the county of Canadian, at El Reno, Monday, Oct. 28, 1901.

For the county of Cleveland, at Norman, Monday, Nov. 25th, 1901.

It is further ordered by the court: That the clerk of this court transmit a certified copy of this order, attested by his official signature and the seal of this court, to each of the district courts of the Territory and to the United States attorney and the United States marshal.

JNO. H. BURFORD,
Chief Justice.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

UNITED STATES OF AMERICA, }
Territory of Oklahoma, } ss:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order this day made, fixing terms of courts in the second judicial district, as the same appears on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court at Guthrie, this 7th day of September, 1901.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

39 TERRITORY OF OKLAHOMA, }
Second Judicial District, County of Washita, } ss:

Be it remembered, that in the district court in and for said county, district and Territory, in the matter of the change of place of confinement of John T. New, the following order was made by the judge of said court at his chambers in El Reno, Okla., on the 24th day of August, 1901, in words and figures as follows, to-wit:

In the District Court of Washita County, Oklahoma Territory.

TERRITORY OF OKLAHOMA }
vs. } Order of Court.
JOHN T. NEW, Defendant. }

The said defendant John T. New, having made application to this court that he might be removed from the jail of Canadian county to some other place of confinement, and it further appearing that the sheriff of Washita county and the county attorney of said Washita county have each given their consent to such removal.

Now, therefore, it is hereby ordered that the sheriff of Washita county, Oklahoma Territory, do remove the said John T. New from confinement in the jail of Canadian county, Oklahoma Territory, to

the jail located at Mangum, Greer county, Oklahoma Territory. That the said defendant be there confined until the convening of this court at the next regular term at which time said sheriff of Washita county shall have the said defendant confined in the jail of Washita county, Oklahoma Territory.

Signed at El Reno, August 24-h, 1901.

C. F. IRWIN,
Judge of the 2nd Judicial District, Oklahoma Ter.

Attest:
[SEAL.] E. M. HEGLER, *Clerk.*

Endorsed on back: Territory *vs.* New—Order to change defendant's place of confinement. Returned and filed October 12th, 1901) E. M. Hegler, clerk by G. E. Wagner, deputy.

40 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court of said County.

In re assignment of the trial docket for the October term, 1901.

Order.

It is ordered: That the trial docket within and for the county of Washita, Territory aforesaid, be and hereby is set and assigned for trial as hereinafter set forth; that cases assigned for trial will be called for trial in the order of their setting and in the event the assignment for any day should be undisposed of at the end of said day, the same will be resumed the following day in order of setting, to-wit:

October 15th, 1901—1st day.

317, Territory of Oklahoma *vs.* John New.

* * * * * * *

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, }

In the District Court of said District and Territory.

In the matter of drawing and summoning the grand and petit juries within and for the county of Washita, in said district and Territory, for the regular term, 1901, thereof.

Order.

Ordered: That the clerk of this court shall proceed at once to have drawn and summoned according to law, eighty persons possessing the qualifications of jurors, to serve as such within and for
41 the county of Washita, district and Territory aforesaid, at the regular October term, 1901, of the district court thereof, and place the summons therefor in the hands of the sheriff of said county for service; said summons to command said jurors to be and appear at Cordell in said county on the 15th day of October, 1901, at 9 o'clock a. m. thereof.

It is further ordered; That the first 20 persons so drawn shall be forthwith inserted in a summons to be served as grand jurors and the remaining persons so drawn shall be inserted in a summons and served as petit jurors; that the said sheriff shall use due diligence and promptness in service and make affidavit to his return and provided the full number are not summoned additional drawing shall be had in all respects as the original drawing until the full number provided for in this order are served.

Witness my hand at El Reno, this September 30th, 1901.

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court.

In the matter of the drawing of the grand and petit juries within and for said county for the regular October term, 1901, of the district court thereof.

Be it remembered, that on this 1st day of October, 1901, pursuant to an order of the judge of said district court heretofore made and entered, comes John W. Miller, sheriff of said county, and G. D. Coker, county clerk of Washita county, Oklahoma Territory, said G. D. Coker having in his custody the jury box ofsaid county and

together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified and acting deputy for said county, proceed in due form to draw from said
42 jury box eighty names to constitute the grand and petit juries of the district court for the October term, 1901, of said court as commanded by said order. And now said jury box having been thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents and said officers proceed to draw alternately therefrom ballots in the following order: J. J. Barnes, W. A. Chappelear, J. T. Flake, S. V. Force, J. H. Squires, W. H. Reed, H. F. Browers, D. D. Weins, B. E. Bryant, S. D. Dodd, N. H. Johnson, J. P. Timmons, B. F. Davis, T. B. Page, B. D. Walker, L. D. Green, G. B. Frothe, W. F. Olliver, E. S. Rigsbee, John H. Dick, Andrew Whitby, H. Bonham, J. W. Jothan, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Mitchell, John Ctaes, James Rodgers, Henry Koch, John Reeder, N. W. Cook, T. Orbison, C. S. Shive, J. W. Whaley, J. S. Lisle, F. C. A. Raasch, J. B. Messinger, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, A. P. Lockhart, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. F. Hartrouft, C. W. Meler, R. L. Thompson, Sam Williams, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, J. W. Penn, A. S. Shoford, J. H. Breeding, W. W. Neeley, B. C. Warren, S. R. Stephens, R. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, and now the clerk prepares summons from said ballots as ordered, and delivers them to the sheriff of said county for service and in the presence of said officers destroys said ballots by burning.

And afterwards, to-wit, on the 10th day of October, 1901, comes the sheriff and makes return of the grand jury venire heretofore issued and delivered in the words and figures as follows, to-wit:

"Received this writ this 1st day of October, 1901, and served the same on the within named W. A. Chappelear, J. T. Flake, S. V. Force, J. H. Squires, W. H. Reed, H. F. Browers, D. D. Weins, B. E. Bryant, S. D. Dodd, J. P. Timmons, B. F. Davis, L. D. Green, W. F. Olliver, E. S. Rigsbee, John H. Dick, by leaving a certified copy of the original venire with each of the said jurors and reading them the original venire.

JOHN W. MILLER, *Sheriff.*

43 TERRITORY OF OKLAHOMA, } ss:
Washita County, }

John W. Miller, sheriff, after being duly sworn deposes and says that he received the within grand jury venire on the 1st day of October, 1901, and served the same on the foregoing named jurors named in said venire, in the manner and form above set forth, and

that he return as unfound and unserved the following named jurors, to-wit: J. J. Barnes, not found in county; T. B. Page could not be found in the county; B. D. Walker could not be found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 10th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 10th day of October, 1901, comes John W. Miller, sheriff, and makes return of the petit jury venire in words and figures as follows, to-wit: "Received this writ on the 1st day of October, 1901, and served the same on the within and following named H. Bonham, J. W. Johnson, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Mitchell, John Cates, James Rodgers, Henry Kock, John Reader, N. W. Cook, T. Orbison, J. W. Whaley, J. S. Lisle, F. C. A. Raasch, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. F. Hartrouft, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, W. W. Neeley, B. C. Warren, S. R. Stevens, R. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, J. H. Breeding, by leaving a certified copy of the original venire with each juror; and after diligent search and inquiry returns as unfound and unserved the following within named jurors, Andrew Whitby, who is deceased, C. S. Shive, no person by such name could be found
44 in the county; J. B. Messinger, has moved to Nebraska, C. W. Meler could not be found in the county; R. L. Thompson has removed from the county; Sam Williams has removed from Washita county; J. W. Penn has moved from Washita county; A. S. Shuford has moved to North Carolina; A. P. Lockhart, not served, has moved from county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 10th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 10th day of October, 1901, come John W. Miller, sheriff, and G. D. Coker, county clerk of Washita county, Oklahoma Territory, said county clerk having in his custody the jury box of said county, and together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly ap-

pointed qualified, and acting deputy for said county, proceed in due form to draw from said jury box fourteen names to complete the grand and petit jury panels of the district court for the October term, 1901, of said court as heretofore ordered. And now said box having been thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents of said box and said officers proceed to draw alternately therefrom ballots in the following order, to-wit: S. Sherod, Oscar Ford, W. H. Combs, E. D. Reed, W. B. Cox, A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Bryne, A. J. Boydston, W. F. Smith, Daniel Webster and George Spivey, Whereupon the first five names so drawn are inserted in a grand jury venire, and the remaining nine names are inserted in a petit jury venire and said venires are placed in the hands of the sheriff for service, and the ballots containing said names are destroyed by burning in the presence of said officers.

45 And afterwards, to-wit, on the 12th day of October, 1901, comes the sheriff and makes return of the second grand jury venire in words and figures as follows, to wit: "Received this writ on the 10th day of October, 1901, and served the same on the within named S. Sherod, Oscar Ford, W. H. Combs, E. D. Reed and W. B. Cox, by reading to them the original venire and delivering to them a certified copy of the same.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 12th day of October, 1901.

E. M. HEGLER,
District Clerk,
[SEAL.] By G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 12th day of October, 1901, comes the sheriff and makes return of the second petit jury venire heretofore issued and delivered to him in words and figures as follows, to-wit; "Received this writ on the 10th day of October, 1901, and served the same on the within named A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Byrne, A. J. Boydston, W. F. Smith, Daniel Webster, by reading to them the original venire and delivering to them a certified copy of the same. George Spivey could not be found in the county. He has moved therefrom.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 12th day of October, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

46 And afterwards, to-wit, on the 12th day of October, 1901, comes John W. Miller, sheriff, and G. D. Coker, county clerk

of Washita county, Oklahoma Territory, said county clerk having in his custody the jury box of said county and together with E. M. Hegler, the clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified, and acting deputy for said county, proceed in due form to draw from said jury box one name to complete the petit jury panel for the October term, 1901, of the district court for said county as heretofore ordered. And now said box being thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents thereof, and said county clerk, whose alternate time it is to draw, draws from said box the following named ballot, to-wit: Morris Farr, and said name is inserted in a petit jury venire and placed in the hands of the sheriff for service, and said ballot is destroyed by burning in the presence of said officers.

And afterwards, to-wit: on the 14th day of October, 1901, comes John W. Miller, sheriff, and makes return of the third petit jury venire heretofore issued and delivered to him, in words and figures as follows, to-wit: "Received this writ on the 12th day of October, 1901, and after two days' diligent search have failed to find Morris Farr in the county, he has moved therefrom.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 14th day of October, 1901.

[SEAL.] E. M. HEGLER,
District Clerk.
G. E. WARNER, *Deputy.*

47 And afterwards, to-wit, on the 14th day of October, 1901, comes the heretofore named sheriff and county clerk of Washita county, Oklahoma Territory, said clerk having in his custody the jury box of said county, and together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified, and acting deputy for said county, proceed in due form to draw from said box one name to complete the petit jury panel of said court for the October term, 1901, thereof, as heretofore ordered. And now said box being thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents thereof and said sheriff, whose alternate time it is to draw, draws therefrom the following ballot, to-wit: John Roth. And now the clerk inserts said name in a petit jury venire and places same in the hands of the sheriff for service, and said ballot is destroyed by burning.

And afterwards, to-wit: on the 14th day of October, 1901, comes the sheriff and makes return of the fourth petit jury venire in words and figures as follows, to-wit: "Received this writ on the 14th day of October, 1901 and served the same on the within named John

Roth by reading to him the original venire and delivering to him a certified copy thereof.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 14th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WARNER, *Deputy.*

48 TERRITORY OF OKLAHOMA, }
Second Judicial District, County of Washita, } ss:

Be it remembered that in the district court in and for the county of Washita, district and Territory aforesaid, on the 15th day of October, 1901, the same being the first judicial day of the district court in and for said county, district and Territory, of the regular October term, 1901, thereof, after said court had been duly opened for the actual transaction of business the following proceedings among others were had, to-wit:

In the matter of empanelling the petit jury.

Comes now into open court the following named persons heretofore drawn and summoned as petit jurors for the October term 1901, term of this court, to-wit: H. Bonham, J. W. Johnson, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Cates, James Rodgers, Henry Koch, John Reader, N. W. Cook, T. Orbison, J. W. Whaley, J. S. Lisle, F. C. A. Reasch, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. E. Hartrouft, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, W. W. Neeley, B. C. Warren, S. R. Stevens, C. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, J. H. Breeding, A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Byrne, A. J. Boydston, W. F. Smith, Daniel Webster and John Roth.

49 Whereupon said persons are sworn to true answers make to questions propounded to them touching their qualifications as jurors and are separately examined by the court, and now J. W. Johnson, N. W. Cook, T. Orbison, B. C. Warren, and John Roth are excused for the term on account of sickness; R. B. Langford and John A. Smith on account of age, the privilege being demanded, and S. R. Stevens on account of being a post master. And the remaining persons being found qualified are by the court accepted as the petit jury panel for the term and ordered placed in the jury box.

Ordered that court stand adjourned until tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

50 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

Be it remembered that on this 15th day of October, 1901, the same being the first judicial day of the district court in and for said county, district and Territory, for the October term, 1901, thereof, the court having been duly opened for the transaction of business, the following proceedings among others were had, to-wit:

TERRITORY OF OKLAHOMA } No. 317.
vs.
JOHN NEW, Defendant.

Comes now the Territory by T. A. Edwards, county attorney of Washita county, and Smith & Sitterley, L. R. Cowan, and —— Abernathy, assistant prosecutors and defendant in person into open court and by his attorneys, Henry Furman, Forrest & Lowe, and S. C. Massingale. And now the court grants the prosecution leave to endorse additional names upon the indictment upon serving a list thereof to the defendants. And now both sides announce ready for trial and said cause being regularly reached, the court directs a jury drawn and empaneled to try said cause. Whereupon the clerk proceeds to draw said jury from the regular petit jury panel and the right of challenge for cause and peremptory being duly exercised by respective parties hereto, the following named jury is selected, empaneled and sworn to try this cause to-wit: W. F. Reese, John Cates, J. L. Hoover, John Franklin, W. S. Petty, J. S. Hatchett, A. M. Hollis, John Reader, A. B. Jones, W. F. Barnes, Daniel Webster and J. L. Nichols. And now the prosecution reads the indictment to the jury and informs them of defendant's plea of not guilty
51 thereto. And the hour for adjournment having arrived, the court duly admonishes said jury, appoints and swears two bailiffs and said jury retire in their charge.

Ordered that the sheriff furnish meals and lodging to the jury and bailiffs during the trial and consideration of this case.

Ordered that court stand adjourned till tomorrow morning at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

52 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on the 16th day of October, 1901, the same being the 2nd judicial day of the district court in and for said county, district, and Territory aforesaid, of the regular October, 1901, term,

thereof, the court having been duly opened for the transaction of business, the following proceedings among others were had to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant. } #317.

Comes now the prosecution by its attorneys and defendant in person into open court and by his attorneys; comes also the jury in charge of their sworn bailiffs and all being present the trial of this cause is resumed. And now the Territory makes its statement of case and at request of parties the rule is invoked as to witnesses, except as to wife of defendant and wife of deceased and character witnesses. And now the Territory introduces its evidence and rests. Thereupon the defendant makes his statement and introduces his evidence and rests. And there being no evidence in rebuttal, the court instructs said jury in writing. And now defendant files his bill of exceptions No. 1, which is allowed by the court. Thereupon the Territory makes its opening argument and being concluded the defendant makes his argument and the hour for adjournment having arrived, the court duly admonishes said jury, and swears the bailiffs and said jury retire in their charge.

Ordered, that court stand adjourned till tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

53–157 That a full and complete transcript of the evidence introduced and the proceedings had in said cause at the trial thereof, as shown by a transcript of the shorthand notes of the official court stenographer of said court, is as follows to-wit:—

* * * * * * *

158 By the COURT: Swear the jury, Mr. Clerk.

By the CLERK: Stand up gentlemen.

Jury stand and are sworn to try the cause according to the law and the evidence.

By the COURT: Let the case be opened on the part of the Territory and the indictment read.

The county attorney reads the indictment to the jury, and informs the jury that the defendant has pleaded not guilty thereto.

The county attorney makes his statement to the jury.

Here the defendant by his counsel waives his opening statement at this time.

By the COURT: Gentlemen of the jury we will adjourn now until to-morrow morning. Observe what the court has already said to you about not talking about the case or allowing any one to talk about it in your presence or to you. Keep your minds free from any opinions or impressions until the cause is finally submitted to you.

159 By the COURT: Open court, Mr. Crier.

By the CRIER: Oyes, oyes, oyes,—the honorable district court in and for Washita county, Oklahoma Territory, is now in session.

By the COURT: Call the jury, Mr. Clerk.

The clerk calls the jury. All answer present. The defendant present, and by counsel. The Territory present by its counsel.

By the COURT: You may proceed gentlemen, if you are ready.

By the COUNSEL FOR THE DEFENDANT: With the permission of the court we will now make our opening statement.

By the COURT: You may make it at this time if you wish.

Here the counsel for the defendant makes his opening statement to the jury.

By the COUNSEL FOR THE TERRITORY: We ask leave of the court at this time to endorse the name of one additional witness for the Territory on the indictment.

By the COURT: Let it be endorsed by serving a copy of the same on the counsel for the defendant.

To which the defendant excepts. Exception allowed.

By the COUNSEL FOR THE TERRITORY: We will ask the court to enforce the rule excluding the witnesses from the room.

By the COURT: Let the rule be invoked with the exception of deceased's wife and defendant's wife. All the other witnesses may be excluded.

By the COUNSEL FOR THE DEFENDANT: We have certain character witnesses here your honor. I presume the rule will not be invoked as to them.

By the COURT: No they will be permitted to remain in the room. You had better call all the other witnesses and have them sworn.

Here the witnesses for the Territory and the defendant are called and sworn and instructed by the court as to the rule excluding them from the room and also from talking about or discussing their testimony or what they will or have sworn to.

160 By the COURT: Call your witnesses Mr. Edwards.—Proceed with the case.

Mr. G. E. TROTTER called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by Mr. T. A. EDWARDS, county attorney:

Q. State your name.

A. Trotter is my name.

Q. Where do you reside?

A. I live east of here, near Combs.

Q. Were you living out there on the 13th day of April, 1901, this year?

A. Yes sir.

Q. Are you acquainted with the defendant, John T. New?

A. Yes sir.

Q. Were you acquainted with the deceased, H. F. Doyle?
A. Yes sir.
Q. I will ask you to explain to the jury the situation of the country. The proximity of your house to the house of the defendant, John T. New, and the deceased, H. F. Doyle?
A. New's house is a—is north and a little west, and Doyle's is a little north and east.
Q. Do you live on a public road?
A. Yes sir.
Q. Which way does that road run?
A. East and west.
Q. Which side of the road?
A. South side.
Q. How far from your house is the house of the defendant, New?
A. Well it is a little over one half mile.
Q. In what direction?
A. A little north of west, a little north of west, a little west of north.
161 Q. In what direction from your house is the house of the deceased, Doyle?
A. East and a little north.
Q. Look at this diagram and state if it is a correct representation of that locality?

Handing the witness a diagram, marked Exhibit A.

A. Yes sir I think that is correct as I know.

(Here the attorney puts the diagram on an easel and asks the witness to step down to it. Here the witness walks down to the map.)

Q. Now this is Combs. (Indicating on the map.)
A. Yes sir.
Q. This is the section line now. (Indicating.) This is the section line going east from Combs towards Doyle's.
A. Yes sir.
Q. How far is it from Combs down to your place? This is the next section line. (Indicating.)
A. Yes sir.
Q. Now show the jury the location of the defendant's residence.
A. It is right here. (Indicating on the map.)
Q. Where is your residence?
A. Right here. (Indicating.)
Q. Where is the residence of the deceased?
A. This is it. (Indicating.)
Q. Now you say it is one half mile from here down to this section line. (Indicating.)
A. It is across a quarter section.
Q. This is north, and this south and this east and this west. (Indicating on the map.)

A. Yes sir.

That is all you can be seated. (Witness resumes witness stand.)

162 Q. Locate the residence of Mr. King while you are locating there.

A. It is here. (Indicating on the map.)

Q. Is that correct?

A. Well no sir. He lives nearer the center.

Q. Is that right?—(Indicating on the map.)

A. Yes sir that would be about right.

Q. Is this the north and south section line running here? (Indicating.)

A. It is open from this section line south, it is closed along here. (Indicating.)

Q. Unopened?

A. Yes sir.

Q. And it is open south here? (Indicating.)

A. Yes sir.

Q. Did you see the defendant New and the deceased Doyle on the 13th day of April last, 1901.

A. Yes sir.

Q. You may go on and tell to the jury in your own way what you saw at that time?

A. Well on that day I went to the post office, Woods to get my mail, and stayed there until after the mail came in, and I got my mail and started down home, and me and Mr. Primm, I think Jack Primm, I think the youngest one of the men and Mr. I do not think of his name, another man leading a horse, was coming down the road together. I came to my house and they went on and I went in, and was a reading the paper. And Mr. Kites came to my house with a wagon and called for some hay that I let New have, and I went down to about the hay stack, to show him how to get in without running over some trees. I heard some shooting commence up on the section line, west of my house. And I heard a ball go across the field and heard it hit the ground. I did not know who

163 it was. I did not know whether it was a drunk or a team running away and trying to shoot the horses and stop them or what, and these two men had not come into my mind yet at all. I said to my boy, he was out south of the house, putting a planter on the lister, I said Come around the house, those fellows might hit you. I went to the house. I thought I would step to the corner of the house and see who it was. I saw Doyle's team coming by the house, I knew they had got into trouble. That was the first I thought of them. I went to see who it was. I saw Doyle. I heard a gun fire, and he grabbed his right leg, and went down on his right knee. And he ris and he went on. I stepped back some. And then I stepped up and saw Doyle coming through the fence, he said Do not let him kill me, I looked again and saw New running down the fence on the inside of his pasture. I was in range and I

ran behind the house, and Mr. Doyle still holding to his leg and running for the house. He did not stop. I went out and thought I would stop New. I was getting over my fence and he his. And I met him in the road. I said John this will never do, he slung me loose and swung round, he said with an oath Turn me loose.

Q. What did he say? Give his language.

A. He said, God damn you turn me loose. And slung me loose. I followed him. And I overtook him and my wife met him. When she met him I overtook him. And we took hold of him and we went in the room. And my wife said, Don't kill him, and he said Turn me loose and I won't. She turned him loose. And I expected them to go to shooting. I said Let's go out. And we got out to the dugout and I heard a shot, and I turned and looked and saw New standing in the door. And he went out to the wagon and took out a horse and got on it and went, I came around the house, he rode west, and about that time Mrs. Doyle came up. And she started around to
the back door and I said Come to the front door. And Gracie
164 Doyle followed her and I followed Gracie. And she said,
Throw him on the bed. I took the mattress off. I said Pull him over. I said He is dying. I walked around the house. And she walked around the house a piece, and she and Gracie went out. And Gracie went in and went to her father and taken his knife and pocket book out and gave it to one of the Primms boys. And stood there in the yard and rubbed the blood off her hand.

By the COUNSEL FOR THE DEFENDANT: We object to that. We ask that that be stricken out.

By the COURT: Sustained. Let that in reference to the blood be stricken out.

A. And Mrs. Doyle commenced taking on.

Interrupted—By COUNSEL FOR THE DEFENDANT: Do not tell that.

By the COURT: Do not tell that.

A. Well the body was turned over in the mattress and laid there until the coroner's jury came. So far as I know. After some men came in and took charge of the body I went into the dug out. I did not go in there in the house any more until I was called before the jury.

Q. Now you say that you was out at the crib or barn when the shooting began?

A. No sir.

Q. Did you not state that you was at the hay stack.

A. I—no sir I had been there and started to the house.

Q. When you heard the shooting begin?

A. Yes sir.

Q. How many shots were fired?

A. I do not know.

Q. About how many?

A. I think five or six in all.

Q. What was the first thing you saw of these parties after the shooting began? What was the first sight you had?

165 A. Mr. Doyle was the first sight.

Q. Where was he?

A. Outside the fence, near my fence, upon the outside in the section line. Nearest to my fence in the section line.

Q. Where was New?

A. I had not seen him.

Q. Where was he when you first saw him?

A. Inside his pasture coming down his fence.

Q. Across the section line?

A. Yes sir on the inside of his fence.

Q. What did he have?

A. A gun.

Q. What kind of a gun?

A. I would not swear.

Q. What was said by the deceased to you?

A. The only word he ever spoke to me he said Do not let him kill me. He said Mr. Trotter do not let him kill me, just as he came to the fence.

Q. Now what was the condition of the deceased when you met him?

A. He had his hand hold of his knee—that way—(indicating)—and when he walked he would grab his knee that way with both hands.

Q. Did you see any blood?

A. Yes sir.

Q. Where?

A. I saw blood from about six feet from the fence.

Q. Did you see any on his person?

A. Yes sir.

Q. Where?

A. Over his shoes and on his pants leg at the bottom.

Q. How far was the defendant from the deceased when you first saw them?

166 A. I suppose something over one hundred yards. That is New was one hundred yards from Doyle.

Q. At what gait was New going? Was he running or walking?

A. I cannot state. I did not pay that much attention to the defendant New.

Q. Where did you meet New?

A. In the road.

Q. How far from the house?

A. I suppose thirty or forty or maybe fifty yards. Maybe not so far. My house is the width of the section line from the road. We met some where near the middle of the road.

Q. Tell all that passed between you and the defendant New when you met him?

A. Nothing passed only as I took hold of him I said John, this will never do, and he slung me loose and went on.
Q. At what gait was he going?
A. Pretty fast.
Q. Running?
A. I do not know whether he was running or going in a fast walk.
Q. He slung you loose?
A. Yes, sir.
Q. In what direction did he go?
A. He went around me and went on.
Q. What direction?
A. Towards the house.
Q. Did you go after him?
A. Yes sir.
Q. Did you catch him? Did you try to catch him?
A. Yes sir.
Q. How close to your house was it that your wife met him?
167 A. It was in the yard.
Q. How close to the house?
A. About as far again as across this rostrum from the house.
Q. You pursued him until he met your wife?
A. Yes sir.
Q. Could you catch him?
A. I did not.
Q. Tell all that passed between New and your wife when they met.
A. I do not know as I can. If there was a word spoken until we got to the door I do not know it. Not ary one.
Q. When did you get hold of him after he first broke loose?
A. Not very far from the room door.
Q. After your wife had taken hold of him?
A. Yes sir.
Q. Did you both, you and your wife have hold of him until he got to the door?
A. I do not suppose over three feet from the door. I got hold of him.
Q. What passed when you got to the door?
A. Nothing said at all. After we got in the room my wife said For God's sake do not kill him in the house. Maybe she said that twice and he said Turn me loose and I wont.
Q. You was in the room?
A. Yes sir.
Q. And he and your wife?
A. Yes sir.
Q. What did you do then?
A. My wife turned him loose and he opened the door.
Q. You was in the side room?

A. Yes sir. And he opened the door leading into the main room.

Q. What was done then?

A. I turned him loose and said Sue let's get out of here.

168 Q. Where did he go?

A. I do not know. I suppose that he went into the house.

Q. What did you do?

A. Went out to the dug out. I heard a gun fire.

Q. When? Where?

A. In the house.

Q. What did you next see?

A. I stepped around the dugout and saw New standing in the door.

Q. This same door?

A. No sir. I mean the side room door.

Q. What did he do then?

A. He went on the north side of the house and then to the wagon.

Q. What did he have in his hand?

A. A gun.

Q. Whose wagon was that?

A. I do not know, a wagon that his hired man had brought down there.

Q. He took a horse out of the wagon and got on it?

A. Yes sir.

Q. Which way did he go?

A. Back west.

Q. The direction that he came from?

A. Yes sir.

Q. Rode back in that direction?

A. Yes sir.

Q. Where did you next see him?

A. Coming back.

Q. From west going east?

A. Yes sir.

Q. Pass your house?

A. Yes sir.

Q. Where did he go?

169 A. Down to the wagon where the horses fell.

Q. Where from the house?

A. Something near middle ways between my house and Mr. Doyle's.

Q. Whose wagon was it?

A. I do not know. I suppose the wagon that Doyle had been driving.

Q. What did he do?

A. He rode up and looked in the wagon and turned and rode back west.

Q. Did you see anything more of him?

A. He rode back west. And Mrs. Doyle asked me to go and see

if Dick was in the wagon. And I went down and came back and him and Mrs. New, was standing there and Lightfoot had just left.

Q. She said see if Dick is in the wagon. Who is Dick?

A. Dick Reeves.

Q. Her brother?

A. Yes sir.

Q. Did you look?

A. Yes sir.

Q. When did you go in the house?

A. After Mrs. Doyle went in.

Q. What did you find?

A. I found Mr. Doyle sitting in the house, his hands in his lap and his feet stretched out.

Q. Did you see any wounds?

A. Yes sir a hole in his jaw about here. (Indicating).

Q. Any other, any other marks about his person?

A. No sir.

Q. Did he have his hat on?

A. I do not think he did. I am not certain about that though. I would not say for certain.

170 Q. Was he sitting down on the floor?

A. Yes sir with his legs out straight.

Q. Let the table represent the bed and the windows the door and show the jury where he was.

A. The door open something near about two feet I suppose between the foot of the bedstead and the door, is something near two feet, maybe more and maybe not so much. The door open toward the bed, and he was sitting down with his back to the wall, and his feet stretched out straight, and his hands in his lap, and his head bowed over on his breast.

Q. In what county was that and when?

A. In Washita county. It was as well as I can recollect about the 13th day of April.

Q. What year?

A. 1901.

Q. In what Territory?

A. Cheyenne Territory, I believe.

Q. That happened in Oklahoma Territory did it not?

A. Yes sir. I said in 1901 I do not know about that. I believe it was.

Q. It was last April was it not?

A. Yes sir.

Q. Mr. Trotter did you go after the shooting to the place where you thought the shooting was done?

A. I went the next morning.

Q. And what did you find?

A. I did not find anything except some blood there in the road. I saw some tracks there.

Q. How far, do you know where the gate is that leads from the section line into the field that goes to New's house?

A. Yes sir.

171 Q. How far is that from your house?

A. Something near four hundred yards, three hundred and something.

Q. Where was this blood and those tracks from that gate?

A. Well it was as near as I can tell right opposite the gate.

Q. And about three hundred and some odd yards from your house?

A. Yes sir.

Q. Now indicate that gate on the map for the jury.

A. The gate would be about there. (Indicating.)

Q. And it is about four hundred yards from this gate down to your house?

A. Yes sir. Something near that.

Q. Did you have a turnip patch?

A. Yes sir.

Q. Where was it?

A. Right along in there. (Indicating.)

Q. Now after the defendant New went down to the wagon as you have stated he passed back west?

A. Yes sir.

Q. Did he say anything as he passed?

A. Yes sir.

Q. What?

A. He said to come out that he wanted to see me.

Q. He was out in the road?

A. Yes sir.

Q. Horse back?

A. Yes sir.

Q. What did you tell him?

A. I said that I did not want to talk with him. And he said all right and passed on.

Q. You went down and looked in the wagon?

A. Yes sir.

Q. What did you find?

172 A. Some chairs and some quilts. That is all I recollect looking for *that I all I recollect looking for* or seeing.

Q. Some quilts and chairs?

A. Yes sir.

Cross-examination by H. M. FURMAN, counsel for the defendant:

Q. Was there any weapons on Doyle after you found him dead?

A. I did not see any. They told me there were.

Q. You did not make any examination?

A. No sir.

Q. How long before the justice of the peace, Squire Hampton, came?

A. I suppose two hours. Maybe not so long.

Q. Had the body been moved before he came?

A. Not only it had been pulled over on the bed.

Q. You made no examination for weapons at all?

A. No sir.

Q. When Mr. New went in the room where Doyle was, just as he went in you and your wife left?

A. Yes sir.

Q. Where did you go?

A. West of the dugout.

Q. Had you got in before you heard the shot?

A. I did not go in. I went west of it.

Q. How far had you traveled after leaving the house before you heard the shot?

A. I suppose something near thirty feet.

Q. Maybe more.

A. Thirty feet, not more. I do not recollect just how close I was standing to the dug out. The dug out from end to end is about thirty feet long, and about fourteen feet space between the door and the dugout, and we went west of it which would throw us something more probably more than thirty feet.

173 Q. What made you leave?

A. I was afraid I would get shot.

Q. From which way?

A. From in the house.

Q. Who was you afraid of being shot by?

A. I did not know but what Doyle would go to shooting, and from where we were standing I did not know he was as liable to hit us as Mr. New.

Q. Do you know anything about the circumstances under which this shooting began west of you?

A. No, sir.

Q. Do not know anything about it?

A. No, sir; not at all.

Q. What size was that room that you say you and your wife and Mr. New went into, a shed room or a back room?

A. Yes, sir, that was a shed room or a back room.

Q. What size was the room that Doyle was in?

A. A fourteen-foot room.

Q. Fourteen-foot square?

A. Yes, sir.

Q. I will ask you as to whether or not that house has a window to the west?

A. No, sir.

Q. No opening to the west?

A. No, sir.

Q. No window in the west of the side room?

A. No, sir.
Q. Has it in the east?
A. Yes, sir.
174 Q. What?
A. Window.
Q. Door also?
A. No sir.
Q. How do you get in do you have to go into the side room?
A. There is a door in the west end of the side room, and a door in the north end of the main room.
Q. The door is in the west end of the side room?
A. Yes sir.
Q. No door in the west end of the main room?
A. No sir.
Q. And a door in the north end of the main room?
A. Yes sir.
—. ——.
A. No sir.
Q. Just simply a door?
A. Yes sir just simply a door.
Q. Now there was a door in the west end of the small room and you entered that from the yard?
A. Yes sir.
Q. And then there is a door going from the small room to the large room?
A. Yes sir. In the south side of the large room.
Q. How far from the west end of the building?
A. Something near two feet.
Q. Does the door open into the small room or large room?
A. Into the large room.
Q. Is it hung on the east or west facing?
A. On the east.
Q. Then opens west from west to east?
A. Yes sir.
175 Q. You spoke of a bed in that big room, what part of that room was it in?
A. The bed we taken off. It was in the southeast corner.

Re-direct examination by T. A. EDWARDS, county attorney:

Q. Who formerly owned that house of yours?
A. New.
Q. You bought it from him?
A. Yes sir.

Witness excused.

Mrs. G. B. TROTTER called and sworn as a witness on the part of the prosecution, testifies as follows:

Q. You are the wife of G. B. Trotter?
A. Yes sir.
Q. Where do you live?
A. Down near Combs.
Q. Was you living out there on the 13th day of last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.
Q. Did you know the deceased, H. F. Doyle?
A. Yes sir.
Q. How close did you live to those parties?
A. I do not know how far it was.
Q. You were near neighbors?
A. Yes sir.
Q. Did you se- these parties on or about the 13th day of last April?
A. Yes sir.
Q. Where were you at They were down there in the neighborhood there?
A. Yes sir.
Q. Of your house?
176 A. Yes sir at my house.
Q. Now tell the jury all you saw at that time between those parties in you- own way.
A. I had started into the dugout on Saturday evening of April 13th, and I heard some shooting commence, and I got one half way down and I turned and come back, and went to the south of the dugout and looked, and I saw no one and I started to the door again, and just as I got to the door I got there some horses came running by, I run to the east corner of the house and saw the horses fall, and I run to the west of the house and Doyle hollowed. He said, For God's sake don't let him kill me. I said I will do all in my power to keep him from it, or something to that effect. He said, I want to get into the house. I turned and looked and did not see any one and I looked at Doyle and saw the blood running out from his shoe, over his shoe. I went and opened the door for him and he went in. And just as he went in he said, Do not let him come in. I said I will do all— I shut the door and went back to the outside door again, and I saw New coming and I run to him, and got hold of him and asked him not to go in, and he pulled me on to the side room door.
Q. Tell what was said. What you said and what he said.
A. I just asked him not to come in.
Q. Tell what you said.
A. I will when I get to it. He pulled me on and I was still holding to him. He stepped up into the side room door and I stepped

up. And I still had hold of him. He was standing there and I said, For God's sake don't kill him in my house. And I repeated it. He said If you will turn me loose I won't and he took hold of the door knob and went in. And Trotter pulled me out of the door and we went out west of the dugout.

Q. Did you hear anything after you went out?

177 A. Nothing at all only a gun fire. After he went in is all I heard.

Q. What did you next see?

A. The next that I recollect of se-ing was New when he came out in the yard.

Q. What did he do?

A. He walked around there a little while and I think if I recollect right he went down to the stable where our hay, where the hay was piled up, and got a horse and rode around in the yard, a little while or rather went to the gate if I recollect right he was sitting down there on the horse when Mrs. Doyle came down.

Q. Where did you next see him?

A. I never did see him again. I never did see him any more after he left until I saw him in here this morning. After he left to go I never saw him any more. After he left the gate.

Q. He was not around in the country there then was he at his home or near his home?

A. I do not know where he was.

Q. You never saw him any more?

A. Not after he left the gate that I recollect of.

Q. When after New came out did you go in?

A. Never did until Mrs. Doyle did. She went in first. Then Gracie. Then Mr. Trotter and then I.

Q. What did you find?

A. Found Mr. Doyle behind the door.

Q. Did you notice any wounds on his head?

A. Yes sir a hole here about his face somewhere in his cheek.

Q. Did you notice any other wounds?

A. No sir.

Q. Not any more at all.

A. Not at that time I did not. When I first went in.

Q. You met him you stated as he first went in?

178 A. Yes sir.

Q. Was that hole in his head when he first went in the house?

A. No sir I do not reckon it was. I did not notice it. I just noticed the blood on his shoe is all. Until after it was all over and the hole was found.

Q. Did you remain there in the house all the time?

A. I do not know as I did. Stay right there. I stayed around about there. Was not in the house all the time. I was in the dugout part of the time.

Q. In what direction and how far from your house to where these horses fell?
A. Northeast.
Q. On down the road.
A. Yes sir.
Q. Towards Doyle's?
A. Yes sir.
Q. How far from the house?
A. I do not know.
Q. Do you know about how far?
A. No sir.
Q. Whose team was it.
A. Mr. Doyle's.
Q. Those horses that you saw running, how many were there?
A. I do not know—oh there were four. Two with the gears on and two hitched to the wagon.
Q. One wagon?
A. Yes sir.
Q. And two loose horses with the gears on?
A. Yes sir.
Q. That horse that fell, was it loose or one on the wagon.?
A. One that was hitched onto the wagon.

Cross-examination by H. M. FURMAN, counsel for the defendant:

Q. Do you know whether Mr. Doyle had any arms on him?
179 A. I did not see any.
Q. Did you make any examination for any?
A. No sir.
Q. Was there any one else searching for arms?
A. No sir.

Witness excused.

Dr. MCCLAIN, called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name.
A. James McClane.
Q. What is your profession?
A. Physician.
Q. Where do you live?
A. At Combs.
Q. You were living out there last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.

Q. Did you know the deceased?
A. Yes sir.
Q. Did you see either one of these parties on or about the 13th day of last April?
A. I do not remember whether it was the 13th or what day it was, when I was called, that is the date that I saw him. That evening.
Q. You saw the deceased?
A. Yes sir.
Q. In what condition?
A. Dead.
Q. Did you make an examination of him?
A. Not particular no, I examined him some.
180 Q. Tell the jury in what condition the body was.
A. When I saw the body it was lying on a mattress. Lying in about this direction, southwest with his head to the wall. There and he was lying on a mattress and dead.
Q. He was dead?
A. Yes sir he was dead and they had laid him out there.
Q. Did you notice any wounds?
A. Yes sir.
Q. Tell the jury about them.
A. A bullet went in at the left cheek about there, (indicating) and came out on the side of the neck about there. (Indicating.) And went down in the top of the shoulder, and I got the ball out about here, (indicating).
Q. Have you the ball?
A. Yes sir.
Q. Produce it.
A. (Hands the attorney ball.)
Q. That is the ball you got out of him?
A. Yes sir.

We introduce the ball in evidence. There is no objection. It is admitted in evidence and exhibited to the jury.

Q. What other wounds?
A. One wound in the upper and back part of the thigh, entered the back side and came out at the front side. Right about there. (Indicating).
Q. Did you notice any other wounds?
A. Yes sir.
Q. What?
A. The skull was crushed in at the center—at the left side and center of the head. It was crushed open there. Just crushed open there. It looked like it had been struck with a gun barrel or something of the kind.
181 Q. What in your opinion caused the death of Mr. Doyle?
A. I cannot tell you. Whether it was caused from one of the gun shot wounds or the stroke on the head. I cannot tell that.
Q. You cannot tell which of the wounds caused his death?

A. No sir.
Q. Is it your opinion that one of these wounds caused his death?
A. Yes sir.

Witness excused.

Mr. W. A. REEVES, called and sworn as a witness for the prosecution testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. Walter A. Reeves.
Q. Where do you live?
A. I live out near Combs.
Q. How long—you was living out there last April?
A. Yes sir.
Q. Did you know the defendant?
A. Yes sir.
Q. Did you know the deceased?
A. Yes sir.
Q. You may state what relationship if any exists between you and these parties?
A. H. F. Doyle married my oldest sister, and John T. New married my second sister.
Q. Did you see these parties on or about the 13th day of April last?
A. Yes sir.
Q. Where were they?
A. H. F. Doyle was in his wagon and John T. New was in his pasture, or close to his fence.
Q. Now go ahead and state what took place at that time.
182 A. Well when I first saw the defendant, John T. New, he was something like one hundred and twenty-five yards from me. I made this remark to the deceased, Doyle, I said Yonder is John New now, I suppose working on his fence. And I thought he was. I do not know but what I was right about it. Well as we drove on further I remarked, I made this remark, I said As like as not my horses will go in there, and I will have to go in for them, and I said this to Doyle the deceased. I said New may get offended at my coming in I said I do not reckon he will. And we got on I think to the best of my knowledge, I cannot be positive, we must have been seventy-five yards from New, when I spoke this. I told him, I said I do not reckon he will get offended. And about that time I saw him, the defendant look up towards us. I reckon he was I thought so. I did not know. He looked towards us. We drove on and I saw him look the second time. And we drove on and was not expecting any trouble so far as I knew, so far as myself, well as I knew those two men were liable to from what I had heard and seen. And we

drove on until we got in about sixty or seventy yards I guess. New started up the fence going west. We was in the lane going east. He raised up his head. He was getting up. I made this remark. I said, Henry I am afraid you are going to have trouble this evening. He made no reply to anything I said, after I said I thought I saw him working on his fence. And he, New, came on up the fence and when he got something like ten or twelve steps I saw him reach down with his left hand and pick up his gun and yet I did not expect any trouble and he threw it to his shoulder and fired. About as quick as he could. It stunned me. Doyle jumped out of the wagon. And I saw New throw the hull out, and I jumped, I jumped out on the same side Doyle did, on the south side, with my face to the east, and he fired and I just felt it between me and Doyle.

183 Q. Then what was next done?

A. I run west and took a lane south. I saw New shooting at Doyle as long as I could tell in that direction. The team Doyle had, he had a line in each hand, they were surging and pulling a little to the right, towards the south side of the lane, and they finally jerked the lines out of his hand, and when they done that I seen dust fly up around Doyle once or twice at the crack of the gun, and then went on several yards, I was going south and they was going east, I was going due south and these two men were going due east, I saw New lay his gun on the wire close to a post, or on a knot on a post, or possibly on the wire, and I saw him take deliberate aim, pointing towards Doyle, I seen Doyle go down in his right leg and throw his hand down like this, (indicating), I heard no words said by either party while I was present. I seen one or two more shots, Doyle went on down the lane going east, and New was in his pasture going down the string of the fence, on the inside. And Doyle went out of my sight going towards Trotter's house. New done the same. I saw somebody step in front of the man that went in last. I was going south and they east. I was going one way and they going the other. I stood up there. I did not know what to make of it I was excited. I did not know whether he wanted to kill me or not. I was not expecting any trouble so far as I was concerned. Though I was between the other two parties. I stopped up there and rested a while. I was running for the house. I would—I was tired and would stop and rest. I would run as far as I could, I stopped and rested, and heard a shot I did not know where. I saw a man come out of the house. And I saw a man west of Trotter's residence, a little west of his orchard. I was excited and afraid of trouble again, I thought the way the play was made it was for both of us. I may have been mistaken I saw this man on the horse down there and when I turned west he turned west, and when I turned east the man on the horse turned east, I first

184 thought of going to my sister's and then I saw that I could not get there and then I went to King's. I went over Mr. Trotter's fence.

By the COUNSEL FOR THE DEFENDANT: We object to that.
Overruled. Exception.

There was an off set, his fence goes south, and King's fence comes further west than Trotter's, and I went through there in that jog. I saw the gentleman on the horse go west, and when I got one half way between this jog, the jog runs on King's land further than on Trotter's, I got through this and got southeast down to Trotter's house, down to King's house I should say, when I got some place about two thirds the distance I just simply was run down, and I stopped into a walk, and I looked and I saw that it was John New on the horse, bare backed. He never made any pretension to hurt me he was running. I was running from fear. I was following the only course I knew. I went to King's and told him.

Do not tell that.

A. Well I went on into Mr. King's house.

Q. Mr. Reeves, look at this platt and locate these places. After you went into King's house did you see the horse go south the man on horse back?

A. Yes sir he went out of my sight going south.

Q. And you saw him go back?

A. Yes sir the same man and the horse. I had been running and it was too far to be positive. It was I thought the same man it looked to be.

Q. About how fast was he traveling?

A. He looked like he was doing about all he could do.

Q. Now look at this platt, Exhibit A. This will be the platt of the land. This is the section line. Now this is supposed to be Reeves' eighty (indicating the platt).

185 A. This is my mother's place if I understand it. And this is the side on the section line, down south. There is where we were when I saw New working on the fence. He was striking I do not know what he had in his hand. I supposed he was working on the fence.

Q. You was along here by the gate?

A. Yes sir. Some where — this gate, about opposite this gate. And he was down the fence further east.

Q. Within ten or twelve steps and he came meeting you?

A. Yes sir.

Q. And this shooting began about opposite the gate?

A. Yes sir. Somewhere about there.

Q. You jumped out and turned this way. (Indicating.)

A. Yes sir. Turned west and then down this lane.

Q. Where is King's house down this way?

A. King owns the house and land south of Trotter.

Q. South of Trotter?

A. Yes sir. Yes sir.

Q. You had just gone on across and came down this line? (Indicating.)

A. Yes sir.

Q. And then got back to this line?

A. Yes sir.

Q. And you say that Doyle got down this road here, (indicating), down to Trotter's house?

A. Yes sir.

Q. And New down on the inside of the fence in that direction?

A. I did.

Q. You could see them?

A. Yes sir.

Q. Now how many horses did you and Doyle have?

A. I was working two and he two.

186 Q. How many wagons?

A. Two.

Q. Have two there?

A. No sir. I left the wagon that I had at Mr. Jim Lightfoot's.

Q. That was here?

A. Yes sir I do not know their given names well, it was the west one, we call them Upper Lightfoot and Lower Lightfoot.

Q. What did you do with the horses when you left the wagon?

A. Done the lines up and put the traces up and put them in the road in front.

Q. Who was driving?

A. Doyle was.

Q. How was you sitting?

A. In chairs, two chairs.

Q. How far was New from you when you first saw him?

A. I do not know, as near as I can tell, 100 yards or better.

Q. He was coming up the fence towards you?

A. Not when I first saw him.

Q. How long after?

A. Probably a minute or so.

Q. You was coming down the road east in the direction from which he was coming?

A. We was going east, I saw him apparently driving with his right hand, that is what I said, Yonder is John New now, working on his fence.

Q. Was there anything said by any one when you came up?

A. No sir. I never heard a word spoken by Doyle or New.

Q. What was the first thing done between the parties?

A. John reached down and picked up a Winchester sitting on the north side of the post, and throwed it to the right shoulder and fired.

187 Q. Did you hear the ball?

A. Yes sir and felt it.

Q. Where did it pass?

A. Right in front of my mouth.

Q. How much did it miss Doyle?

A. I think a foot to the best of my knowledge.

Q. You both jumped out?

A. Doyle jumped out first. And when he jumped out I saw New throw the thing back, the lever and something fell, I took that to be a shell, and I knew there was going to be some more shooting and I jumped out, and then I saw some more smoke.

Q. You went west to the lane and then south?

A. Yes sir.

Q. You meant the shell when you said the hull a little while ago?

A. Yes sir.

Q. What else did you see hit?

A. Yes sir I saw it light, saw where it hit.

Q. He was holding the team, Doyle was?

A. Yes sir. Had a line in each hand, and was out on the ground, holding them before ever I jumped. Had a line in each hand.

Q. Do you know or did you notice how Doyle was driving as he came up?

A. Yes sir.

Q. How? Had a line in each hand?

A. Yes sir.

Q. Sitting in his chair?

A. Yes sir.

Q. Did he continue to hold them that way?

A. Yes sir. When he jumped out he had a line in each hand. They were high spirited horses and he was trying to hold them.

Q. He was trying to hold them?

188 A. Yes sir he was pulling back and holding them as best he could.

Q. He was on the south side of the wagon?

A. Yes sir.

Q. And had a line in each hand?

A. Yes sir.

Q. Which side was he sitting on when driving?

A. Near the center of the wagon.

Q. How was you sitting?

A. My chair was on the south and I was sitting just this way. (Indicating.)

Q. Now where was you sitting?

A. Like this, (indicating), I was leaning against the wagon there as unconcerned as I am now, and Doyle was sitting here, (indicating), and never answered, never answered a word, never said a word.

Q. Now he was sitting here and which direction was New.

A. Off in this direction, (pointing), northeast, ten or twelve steps to the best of my knowledge.

Q. You and Doyle jumped out on the same side of the wagon?

A. Yes sir.

A. Yes sir.

Q. On the south side?

A. Yes sir.

Q. Away from New?
A. Yes sir.
Q. You saw another ball hit the dust about the time you jumped?
A. I think so.
Q. You heard the shot?
A. Yes sir.
Q. How many shots were fired in all?
A. I think some where to the best of my knowledge, between six and eight, six to the best of my knowledge.
Q. Do you know anything, did you see this wagon and team again after that?
189 A. Yes sir.
A. East of Trotter's on the north side of the lane, about one hundred yards.
Q. Between Trotter's and Doyle's house?
A. Yes sir.
Q. What was its condition?
A. The horse on the north side was dead. He had sprung into the fence and fell over and was laying dead.
Q. That was the horse on the side of the wagon next to New?
A. Yes sir.
Q. Did you see any marks on the horses?
A. Yes sir.
Q. How many?
A. Two. He was shot in front of the left hip, and upon the left shoulder. The shot in front of the left hip had went clear through, and upon the left shoulder a shot but it did not seem to go through.
Q. Now this shot that went through the horse, he was shot in front of the left hip?
A. Yes sir.
Q. Where did it come out?
A. Some where between the hip on the right side and the rib.
Q. Which shot was the closest to the hip?
Q. Where it came out or where it went in?
A. Where it came out.
Q. Can you tell how much?
A. About six to ten inches, I cannot tell positively. I do not think, I saw that it went through him.
Q. You said that you saw New lay his gun on a post or near a post?
A. I did not state that. It was near a post on the wire or against the post. It was up against a post to the best of my knowl-
190 edge. I was too far away to be positive, to an inch or one half inch but it looked that way. And he took deliberate aim and at the crack of the gun I saw Doyle give way, and clap his hands down this way. (Indicating.)
Q. What was Doyle doing before that shot?
A. Running on east.
Q. Toward or from New?

A. Running from him.

Q. In the direction of whose house?

A. In the direction of his own house and Trotter's. Going east and both houses was in front of him.

Q. How far in all did he run from New?

A. It must have been something like three hundred and fifty yards, something like that.

Q. How far to the best you can tell had he run at the time he was shot through the leg?

A. To the best of my knowledge something like one hundred and twenty five yards. From where the shooting started. That I have got to guess at I could not tell exactly.

191 Q. Now you know that land there to the north of that road well?

A. Yes sir.

Q. Do you know anything about a dug out or an old dug out or something near there?

A. Yes sir.

Q. Tell about its location?

A. It is someting like sixty or fifty yards from where the shooting began. And twelve or fifteen steps north of this line. The string of fence running east and west.

Q. About fifteen yards north of the road.

A. Yes, sir, something like that.

Q. How far east of the gate?

A. Something like sixty yards.

Q. How far was this dug out—describe that dug out? What kind of a place is it?

A. Well gentlemen it is an old dug out I reckon. That is what I judged it to be, it is something like three feet deep, and about ten by twelve, I believe that is all. As near as I can tell. Something like ten by twelve. And something like fifteen feet, twelve or fifteen feet from this fence, north.

Q. Feet or yards?

A. Yards, yards I mean and about ten or twelve feet square.

Q. No roof on it?

A. No sir.

Q. Simply a hole about that big and three feet deep?

A. Yes sir.

Q. How far is that from where you first say New?

A. Fifteen or twenty steps, he was fifteen or twenty steps west of it, standing up near a post.

Cross examination by Mr. FURMAN:

By the COUNSEL FOR THE TERRITORY: Wait just a moment I want to ask him another question or two.

192 Q. This was in Washita county?

A. Yes sir.

Q. What Territory.
A. Oklahoma Territory.
Q. What time?
A. It was the 13th day of April, somewhere about the time, somewhere about an hour and one half by sun, to the best of my remembrance.
Q. What year?
A. 1901.

Cross examination by H. M. FURMAN, counsel for defendant:

Q. You and Doyle was coming from Granite?
A. Yes sir.
Q. How far was it from Granite to the place of this trouble?
A. Something like twenty or twenty-two miles somewhere about that.
Q. What time in the day did you leave Granite?
A. It was somewhere between eight and ten o'clock.
Q. In the morning?
A. Yes sir. We eat dinner at North Fork three or four miles this side of Granite.
Q. You was one hundred and fifty yards from New before you recognized him?
A. I do not know, maybe one hundred and fifty or two hundred.
Q. How near was you to him when he first looked up and saw you?
A. To the best of my knowledge something like seventy-five or one hundred yards.
Q. You had traveled something like seventy-five or one hundred yards after you knew New before he saw you?
A. I cannot tell, sure about that. I think fifty-five or sixty yards.
Q. He first looked up, and looked in the direction you were coming, and then looked down and went on with his work?
A. Yes sir he struck, he seemed to be working.
Q. How far had you gone before he looked up and started for his gun?
193 A. I would have to guess at that, it must have been, it may have been seventy-five yards or one hundred yards I cannot tell.
Q. You kept on drawing closer to him?
A. Yes, sir. He came on west coming towards us on the inside.
Q. Now you say that when he shot Doyle jumped out?
A. Yes sir.
Q. And had the reins in both hands?
A. Yes sir.
Q. Do you know W. J. Burroughs who lives at Salyer, in the State of Texas?
A. Yes sir.

Q. Did you see him in Salyer, Texas, on Friday after the killing?
A. I saw him there after Doyle was buried.
Q. Did you not tell him in Salyer that you and Doyle was coming along the road, and saw New, and you said Yonder is that fellow now, you had better look out, and then Doyle began to get his pistol loose, it was pinned in his inside vest pocket, and New went down and got his gun and began to shoot, and you jumped out and run like hell, and Doyle kept trying to get his gun, and hold his team.
Q. Did you tell that?
A. No sir.
Q. Nor nothing like that?
A. No sir.
Q. As a matter of fact is that about the way the trouble started?
A. No sir.
Q. You run?
A. Yes sir.
Q. Did you run fast?
A. I do not know how fast.
Q. And kept it up?
A. Yes sir.
Q. You say that you did not think at first that New was after you, just thought he was after Doyle? Is that all?
A. No sir, I never thought of any trouble at all when I first saw him. And so far as myself was concerned I never dreampted
194 of such a thing.
Q. You never had any trouble with him?
A. No sir—well yes sir we had had some trouble and we had talked it over, and we talked it over and agreed to disagree and have nothing to do with each other.
Q. You never had been carrying a gun for him?
A. No sir.
Q. Do you know W. F. Harper?
A. Yes sir.
Q. He lives at Childress, Texas?
A. I do not know his home.
Q. Do you remember the morning that Doyle was taken to Texas to be buried?
A. Yes sir.
Q. Did you not see Mr. Harper that morning at Doyle's?
A. I did.
Q. Did you not say this to him: "We were all carrying guns for each other but I did not think it would amount to anything, but would just be a bluff?
A. I did not say it.
Q. I will ask you if you did not go to Mr. Trotter's house and in the presence of Charlie Trotter, and the old gentleman, and your brother Solon was with you, if you did not go to Trotter's house and ask him if he ever heard New say anything about you, or about you and Solon, and he said no, and you spoke up and said he had

been talking about you, and you had a good notion to go to his house and call him out and give him a beating?

A. I said that, I did not say anything about beating him.

Q. You are certain of that?

A. Yes sir.

Q. You are certain, you are as certain of that as you are of anything you have testified to?

195 A. Yes sir.

Q. How long before the shooting that this conversation took place?

A. Eight or nine months.

Q. You remember the purport of the conversation and of being there together?

A. Yes sir.

Q. But you did not say that you had a notion to call him out and give him a beating?

A. No sir. I have no recollection of it at all.

Q. Trotter advised you not to go did he not?

A. I do not know about that.

Q. Do you know R. E. Tillford?

A. Yes sir.

Q. On the Monday morning before the killing was you in Port?

A. I never was there.

Q. Was you in West Wood?

A. I remember of being there I do not remember of meeting him.

Q. Did you not tell him in Port that you was going down to Combs, to stay until the small pox scare was over, at your place?

A. I do not remember it.

Q. Did you not tell him that you was going to raise a little hell and he asked you what, and you said You will hear of it, and you said I am going to run John New off and he said John may not run, and you said I do not care a damn, I will run him off or kill him?

A. No sir. I never said that.

Q. You contend there was no animosity between you?

A. No sir. I do not.

Q. There was?

A. Yes sir there was. But we had agreed to let the thing go and have nothing to do with each other.

Q. How many times did he look up?

A. I think twice.

Q. Before he started for his gun?

A. I think so.

196 Q. And you say that after you jumped out you ran as fast as you could?

A. Yes sir just a few steps west and then south. As I was running I looked back, they was going east and I south. Of course I heard the shooting and looked back.

Q. You was running one way and looking the other?

A. I was looking over my left shoulder.

Q. You was looking one way and running another?
A. I was looking over my shoulder.
Q. Was not these parties to your back?
A. No sir.
Q. But is it not the fact that the faster you run and the farther you got the nearer to your back they would be?
A. Yes sir—I suppose so. They was going east and I was going south. We was going off in right angles from each other. I was going south and they east. I was going south and they east. I was the only fellow going south.
Q. Do you know if Doyle was armed, had a pistol?
A. I do not know I think so. I did not see him have any.
Q. Did you see him have a pistol?
A. I did not.
Q. Did you have a pistol?
A. I did not.
Q. Did you not throw your pistol away when running like hell?
A. No sir I did not.
Q. The pistol would not work and you threw it away and took to your heels and run like hell?
A. No sir. *A.* No sir I never carried one in my life.
Q. Is it not a fact that you had, you and Doyle had been waiting for a chance to get New out and kill him?
A. No sir. I did not have any such an idea. I do not know whether Doyle did or not.

197 Redirect examination by T. A. EDWARDS, county attorney:

Q. When did you go to Granite, you and Doyle?
A. Went down Friday morning.
Q. And was coming back Saturday?
A. Yes sir.

Witness excused.

Mr. KING, a witness called and sworn on the part of the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. Where do you reside?
A. Out there near Combs.
Q. Where in reference to Mr. Trotter's place?
A. A mile south.
Q. On the quarter section south of him?
A. Yes sir.
Q. You was living there last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.

Q. Did you know H. F. Doyle?
A. Yes sir.
Q. Did you know W. A. Reeves?
A. Yes sir.
Q. State if you saw Reeves on or about the 13th day of last April?
A. Yes sir.
Q. Where was he?
A. He came to my house.
Q. In what condition?

Objected to. Overruled. Exception. Let him answer.

A. He just came into the house.
Q. Did he have the appearance of having been running?

Objected to as leading. Overruled. Exception.

A. Yes sir.
Q. Did you see anything else after he came in?
198 A. Yes sir.
Q. Tell about it.
A. After Dick came in I saw a man coming up the lane.
Q. From which direction did he come in?
A. I do not know he was in the house before I saw him.
Q. Well you say that you saw some one?
A. Yes sir.
Q. Where?
A. In the lane west of the house.
Q. Now this is the lane is this the lane that leads down west of Trotter's place?
A. Yes sir.
Q. Goes south?
A. Yes sir.
Q. And leads out of the road that runs from Combs, east?
A. Yes sir. This lane I am speaking of leads out of the other lane.
A. By the counsel, Yes sir.
Q. How was he traveling?
A. Horse back.
Q. What direction?
A. North.
Q. How?
A. In a walk but got into a gallop before he got out of my sight.

Witness excused.

Mr. WALLACE KING called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS:

Q. State your name?
A. Wallace King.
Q. Where do you live?
A. A mile and one half east of Combs.
Q. Where in reference to Trotter's.
A. South.
Q. On the quarter south?
199 A. Yes sir.
Q. You was living there in April last?
A. Yes sir.
Q. You know the defendant?
—. ——.
Q. And Doyle?
A. Yes sir.
Q. And Reeves?
A. Yes sir.
Q. Did you see him on the 13th day of last April? You remember the circumstance of the killing?
A. Yes sir.
Q. Did you see him on or about that day?
A. I did not see him until he came to the house.
Q. Did you see him?
A. Yes sir.
Q. Where did you see him?
A. In the house.
Q. Did you see any one else?
A. No sir.
Q. Did you see any person else about that time?
A. No sir. We went on together in the house.
Q. In the road did you see any one?
A. No sir.
Q. Out west of the house in the road, see any one riding a horse back?
A. No sir.
Q. Did you see any one at all that evening riding west?
A. I saw a man come into the lane before Dick came into the house.
Q. From what direction?
A. North.
Q. How was he traveling?
A. In a slow lope.
Q. You saw him come into the lane?
200 A. Yes sir.
Q. Did you see him again?
A. Yes sir. Saw him going back.

Q. What gait was he traveling?
A. He was going in a trot when I saw him going back.
Q. How long was it between the time that you saw him come into the lane and saw him going back?
A. It could not have been over a couple of minutes I guess.

Take the witness.

Cross-examination by Mr. H. M. FURMAN:

Q. Did he start back before Dick came in the house?
A. I did not see him start back. I saw him going back.

Witness excused.

Mr. JIM BLOCKER, called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. Blocker, J. B.
Q. Where do you live?
A. I live about twenty-seven miles southwest of here.
Q. Where do you live in reference to Mr. Trotter's place, C. B Trotter?
A. I live one mile south of the south line of his place. *A.* I live one mile and one half south of the south line of his place.
Q. From the north line of his place?
A. Yes sir.
Q. Do you know John New?
A. Yes sir.
Q. Do you know—was you at home on the evening of the 13th day of last April?
A. Yes sir.
Q. At the time that this killing took place out in that country?
A. Yes sir.
Q. Do you know about the line that runs south running on the west side of Trotter's and King's place?
201 A. Yes sir.
Q. Now state the condition of that road, in the line down near the south end of it, towards your place? Was there a branch across the road down there? At the east end of the section line at the corner? What is the condition of it as to being traveled?
A. Well I know there is no travel on it. The road has always went—in going down the lane they would turn in there, the travel has always been going into Mr. King's place and then into Witten's, there has been no wagon crossing and a man could possibly cross on horse back.

Q. No one comes down that way in going to your house as a rule?
A. No sir.
Q. Did you see any one travelling that road that evening? South of Mr. King's on the west side of his place?
A. I saw a man on the road in the lane on the west side.
Q. Tell about it?
A. I saw a man coming down there.
Q. Which direction?
A. South.
Q. What gait was he going?
A. He was going in a fast trot or a slow lope.
Q. Did you see him again after seeing him going south?
A. Yes sir.
Q. Going in what direction?
A. North.
Q. Going north?
A. Yes sir.
Q. About how much time was there between the time that you saw him going south and north?
A. Just about time enough for a man to travel at a brisk trot or a slow lope, four hundred yards. Or a quarter of a mile. I looked up and saw him and thought it was some one coming to my place, and I looked up to see about when he was coming across, and see if he was coming into my gate. I looked up and saw him going back.
202 Q. What speed?
A. Going in a lope.

Witness excused.

Mr. JAMES WALKER, a witness for the prosecution, called and sworn, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. J. L. Walker.
Q. Where do you live?
A. I live two miles east of Combs.
Q. Do you know John New?
A. I do.
Q. Did you know H. F. Doyle, the deceased?
A. I did.
Q. How far did you live from their places?
A. Hardly one half mile east of Doyle.
Q. Right on down the road east?
A. Yes sir a little over one half mile I mean. The place that he lives or did live on joins mine.
Q. Was you there on the 13th day of last April?
A. I was.

Q. I will ask you if you traveled on that road from your place to Combs?

A. I did from my place to Combs.

Q. And back home?

A. I did I came back home that night. I left home intending to stay away from home all night.

Q. What time did you pass?

A. About an hour and one half by sun. Possibly two hours.

Q. Coming from your place to Combs?

A. Coming from my place west.

Q. Did you hear any shooting?

A. Yes sir.

Q. Where were you?

203 A. I was one half mile east of Combs.

Q. How far were you—do you know where the shooting took place?

A. I know where they said, I did not see it.

Q. Do you know where the gate is on the north side of the section line that leads into the field that goes to New's house?

A. I do.

Q. You know that very well?

A. Yes, sir.

Q. How far was you from that when the shooting took place?

A. One half mile.

Q. West?

A. Yes sir.

Q. How traveling?

A. Horse back.

Q. Did you see any of the parties, that is Reeves or Doyle the evening?

A. Yes sir.

Q. Where were they when you first saw them?

A. Just near Mr. Jim Lightfoot's. You can say by the road a little. And as I got up there Doyle drove the wagon out of the road. He was waiting for Reeves to turn his horses loose I spoke to Doyle and talked a minute. They came on towards home and I went on west.

Q. At what rate of speed was you going?

A. In a walk.

Q. At what rate of speed was you riding when you passed that gate?

A. Riding along in a walk.

Q. Who did you see?

A. Tommy New.

Q. Where was he?

A. Down about Trotter's house. That was the only person I saw along the road.

Q. On the north side, you rode on past this gate and was one half a mile west from it when the shooting commenced?

A. Yes sir.

204 Cross examination by Mr. FURMAN:

Q. You did not see anybody on the south side of the road there?
A. No sir.
Q. Did not see anybody except little Tommy New?
A. No sir. No one at all.

Witness excused.

Mr. JAMES LIGHTFOOT called and sworn as a witness for the prosecution testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. J. A. Lightfoot.
Q. Where do you live?
A. About twenty-four miles southwest.
Q. Where do you live in reference to Mr. New's place?
A. About one half mile southwest of him.
Q. You corner with him?
A. No sir.
Q. The quarter in which your house is does?
A. No sir.
Q. You live on the Combs road?
A. Yes sir.
Q. How far east of Combs?
A. One half a mile.
Q. You know the deceased and the defendant?
A. Yes sir.
Q. And W. A. Reeves—Dick?
A. Yes sir.
Q. Were you at home on the 13th day of last April?
A. Yes sir.
Q. You know the circumstance of the killing of Doyle?
A. Yes sir I heard of it.
Q. Did you see the deceased that evening?
A. I saw him place—I saw him pass my place, the window at my place. I was not out.
205 Q. Who was with him?
A. There was not any one with him when he passed where I could see him.
Q. He passed your house going what direction?
A. East.
Q. Did you hear any shooting?
A. Yes sir.
Q. Where were you?
A. At home in the house.

Q. Did you leave home?
A. Yes sir.
Q. Where did you go?
A. I went east down the road to where just west of Trotter's. I went to Trotter's.
Q. Did you see John New?
A. Yes sir.
Q. Where?
A. About two hundred yards west of Mr. Trotter's house.
Q. What passed between you?
A. I just met him in the road and spoke to him. I told him howdy and I asked him what had occurred, what was the matter, and he just told me that he was out there at work on the fence between my brother and New, the fence was down there had been one wire off for a week or two, and the cattle going through and he said he had been there working on the fence and Doyle and Reeves was coming down the road, he said and just before they got to him they reached after their gun—Go ahead—and he said he knew there had to be something done, or was going to be something done, I could not state for certain, and that when they reached after their gun he stepped up to where his gun was, and picked it up and when they got down pretty close to him he just turned loose, and he told the whole occurrence.
Q. Is that all?
A. No sir. Not exactly, he said that Doyle went on down to the house that he killed him down to Mr. Trotter's house, that was the substance of it.
206 Q. Anything else?
A. I said I am awful sorry; he said Yes I am not sorry I done the work but I am sorry that I had it to do.
Q. Did he say anything about killing any dogs?
A. No sir.
Q. How was he traveling?
A. Horse back.
Q. Any saddle?
A. No sir.
Q. Any harness?
A. I think so.
Q. Did he have anything?
A. He had a Winchester, I suppose he had a gun.
Q. How long after the shooting?
A. A quarter of an hour maybe.
Q. In what direction was he traveling?
A. Going west.

Witness excused.

Mr. W. R. CAMPBELL called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. W. R. Campbell.
Q. Where do you live?
A. In Combs.
Q. Do you know the defendant?
A. Yes sir. I have a short acquaintance.
Q. Did you know the deceased?
A. Yes sir.
Q. How far did you live from these parties?
A. I cannot tell the distance. Our places did join, the way I have built I could not tell exactly.
Q. Did you know of any, did you ever know of any trouble between the defendant New and the deceased Doyle?
207 A. Yes sir, a little.
Q. Did you ever talk with defendant New about that?
A. Yes sir we have talked a little about it.
Q. When did that occur, the conversation?
A. About the killing?
Q. I mean this trouble that you talked about.
A. It was before the killing, I cannot state the exact time, I do not remember.
Q. State the conversation you had about it?
A. I was at work and the subject came up I do not know how. But we got to talking and he got to telling me about going into Doyle's pasture, I do not know why he went there, but they got into dispute some way, and he said something about throwing a piece of metal at him.
Q. Who threw it?
A. New.
Q. Threw it at Doyle?
A. Yes sir. And then he beat him to his gun, I suppose that meant they both had guns, and he said he hunted around until he found what he throwed at him, and I think went along a piece or followed him a piece, and he said he turned down his pants, and turned backwards to him, and sat down to see if he had any resentment to him.
Q. New said he done that?
A. Yes sir.
Q. To see if Doyle had any resentment?
A. Yes sir.
Q. Did he say whether he had any?
A. He did not say anything I do not reckon he had any, he did not have as much as I would have had.

Witness excused.

208 Mr. J. W. MILLER called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS:

Q. State your name?
A. J. W. Miller.
Q. What official position do you hold?
A. Sheriff of Washita county.
Q. You were sheriff last April?
A. Yes sir.
Q. Do you know John New
A. Yes sir.
Q. Did you know the deceased?
A. Yes sir.
Q. Did you know of the circumstance of the killing of Doyle in this county?
A. Yes sir I heard of it.
Q. I will ask you if you arrested the defendant.
A. Yes sir.
Q. Where did you arrest him?
A. In Greer county.
Q. When did you go out to that neighborhood after the killing?
A. The killing was on Saturday night and I went out Sunday morning after the killing.
Q. Did you at once begin search for the defendant?
A. Yes sir.
Q. How long did you continue it?
A. Until the next Saturday night.
Q. And you found the defendant in Greer county?
A. Yes sir.
Q. And you arrested him and brought him back?
A. Yes sir.

209 Cross examination by Mr. FURMAN:

Q. He was sick when you found him?
A. Yes sir.

Witness excused.

By the COUNTY ATTORNEY: The plat as identified and marked Exhibit A is offered in evidence.
No objection. It is admitted in evidence.
The plat follows:

(Here follows diagram marked p. 209.)

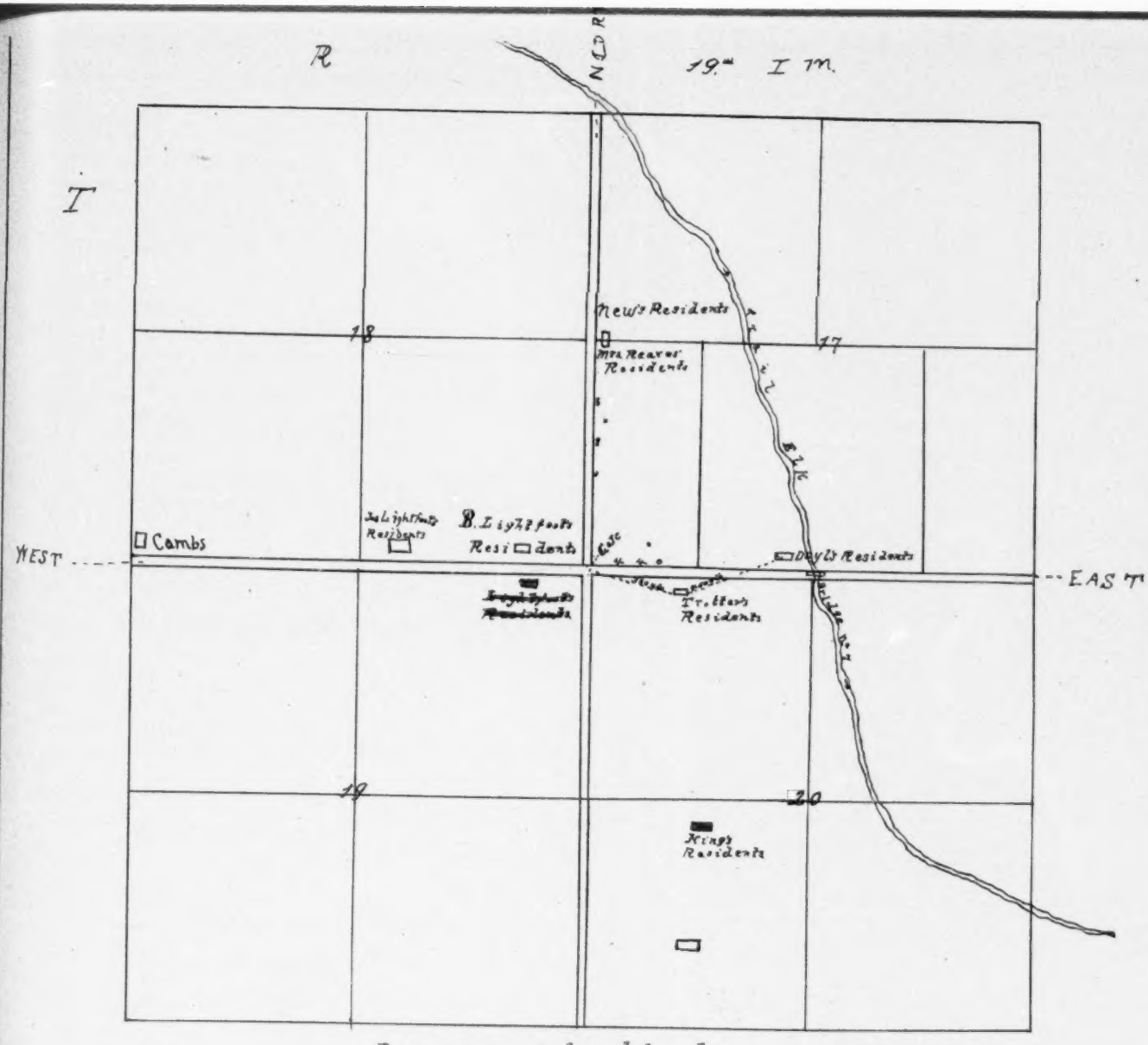

Diagram of locality where Mr. Doyle was shot.

No. 226. New Oklahoma } 209

Exhibit A
T.F. Millikan

180

By the COUNTY ATTORNEY: The Territory will rest.

211 Here the court readmonishes the jury.
Adjourn court to 1.30 Mr. Crier.

By the CRIER: Oh yes, oh yes, oh yes, the honorable district court in and for Washita county, Oklahoma Territory, is now adjourned until one thirty o'clock to-day.

After adjournment.

Open court Mr. Crier.

By the CRIER: Oh yes, oh yes, oh yes, the honorable district court within and for Washita county, Oklahoma Territory, is now in session.

By the COURT: You may proceed. Call the jury Mr. Clerk.

The clerk calls the jury. All answer present. The defendant present in open court by counsel and in person. The Territory present by its counsel.

By the COURT: Proceed gentlemen if you are ready.

By the COUNSEL FOR THE DEFENDANT: Call Mr. Hampton.

Mr. HAMPTON called and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by H. M. FURMAN, counsel for defendant:

Q. State your name.
A. Thomas J. Hampton.
Q. Where do you reside?
A. Southwest part of the county.
Q. Near what post office?
A. Wood.
Q. How far do you live from Combs?
A. About four miles.
Q. Do you hold any official position?
A. Yes sir.
Q. What?
A. Justice of the peace.
Q. Did you hold that office in April of the present year?
A. Yes, sir.
Q. Did you conduct an inquest over the body of H. F. Doyle?
212 A. Yes sir.
Q. Did you make any examination of his body as to whether or not he had any arms on?
A. Yes sir.
Q. Did you find any?
A. I did.
Q. What?
A. A pistol.

Q. What became of it?
A. I have it in charge. It is in the sheriff's room.
Q. Please bring it up.
—. ——.
Q. Who had you summoned here?
A. The Territory.
Q. The prosecution?
A. Yes sir.

Here the witness produces a pistol.

Q. Where did you find that pistol?
A. In the vest pocket of the deceased.
Q. Inside or outside?
A. Inside. In the right side of the vest.
Q. Was it fastened?
A. Yes sir.
Q. How?
A. With a safety pin.
Q. Was the pin point of the pin unfastened, or in what condition?
A. The pin point was out of the safety chamber of the pin.
Q. Please take it out and let the jury see it.
Q. Is it loaded?
A. Yes sir.
Q. Has it been emptied?
A. No sir.

By the COURT: Take it out and let the sheriff empty it.
213 By the COUNSEL FOR THE DEFENDANT: Please take the pistol out of the pocket so the jury can see it.
A. I will have to take the pin out.
Q. Is it in the same shape that it was?
A. Yes sir.
Q. Now take it out.
—. ——.
Q. What is the caliber, and make?
A. I do not know.
Q. You delivered it to the sheriff?
A. Yes sir.
Q. When?
A. I came up Monday morning. Monday evening.
Q. Do you know it is the same pin or not?
A. Yes sir.
Q. Was the pin in that same condition at the time?
A. Yes sir.

By the COUNSEL FOR THE DEFENDANT: We offer the pin in evidence, we want the jury to examine it.

Q. What effort if any did it require to get the pistol out of the pocket?

A. It required some effort.
Q. How many efforts did you have to pull?
A. I think I made the second or third pull before I removed it. If I am not mistaken.
Q. What force did you pull with?
A. I do not know, not distinctly. Some considerable effort to draw it out. It seemed to be cankered and would not slip easily.
Q. What time did you go there?
A. I do not know. After dark and before midnight. It was not dark when I received the news as soon as I could get ready and go down I went.
Q. Who was present when you got the pistol off of the deceased?
A. I do not know. The house was always full. The jury
214 was present and looking on and the constable and Tatumm and others. Some strangers to me, various others.
Witness excused. No cross-examination.
Here the sheriff Mr. Miller is called as a witness for the defendant.
The attorney for the defendant states that he wants him to prove or indentify the pistol.
By the COUNSEL FOR THE TERRITORY: There is no question of the identity of the pistol.
By the COUNSEL FOR THE DEFENDANT: It is waived then.
By the COUNSEL FOR THE TERRITORY: A. Yes sir.
By COUNSEL FOR THE DEFENDANT: Tell the sheriff that we do not need him.

Mr. HARPER called as a witnsss for the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Are you acquainted with Dick Reeves?
A. Yes sir.
Q. Was you at Doyle's house the day he was carried to Texas to be buried?
A. Yes sir.
Q. Did you see Dick Reeves that day there?
A. Yes sir.
Q. Did he state there to you on that occasion that we were all carrying out guns for each other, but I did not think it would amount to anything, I thought it would be just a bluff?
A. Yes sir. He stated to me those facts.

Cross examination by T. A. EDWARDS:

Q. When was this?
A. The morning that Doyle was carried to Texas.
Q. How long after the killing?
A. The killing occurred on Saturday evening, I think and this was on Thursday morning.

Q. Who was present?
A. Me and Mr. Reeves.
Q. Where were you?
215 A. In Doyle's yard.
Q. How came this conversation to come up?
A. I was up there as I had been—we were just merely speaking of the matter. I suggested it to be a bad circumstance.
Q. What did he say?
A. He said—he said—he said, I knew we were all carrying guns for each other, but I did not think it would amount to anything, I thought it would be a bluff.
Q. Who did he mean?
A. I do not know, that is all he said.
Q. What did you say?
A. Nothing.
Q. What did you say before?
A. I said it was a very bad thing, I said It is a very bad thing for such things to happen.
Q. Was there anybody present but you and Reeves?
A. No sir.
That is all.

Witness excused.

Mr. CHARLIE TROTTER called and sworn for the defendant as a witness, testifies as follows:

Direct examination by H. M. FURMAN:

Q. Are you acquainted with Dick and Solon Reeves?
A. Yes sir.
Q. I will ask you if about nine months before Doyle was killed if Dick and Solon Reeves did not come to your father's place, and in your presence ask your father if he had heard Mr. New say anything about them, and your father replied no. And Dick replied He has been talking about us, and they was in a good notion to go up there and call him out and beat him? Did you hear him say such a thing?
A. Yes sir.

Cross examination by T. A. EDWARDS:

Q. When?
A. Something over a year ago.
Q. Where?
216 A. At my father's place, house.
Q. What was said?
A. What was said?
Q. Yes sir what was said?

A. Well sir, he just asked him——
Q. Who just asked him?
A. Mr. Reeves asked my father if he had heard New say anything about him.
Q. Go ahead, asked him if he had heard him say anything about him. Who?
A. New.
Q. What else?
A. He said he had been talking about them.
Q. What else?
A. He said they had heard he had been talking about them and they had a notion to go and whip him.
Q. Was they mad?
A. I did not ask them, I did not know.
Q. They did not appear to be?
A. I cannot state,
Q. When did you next think of that? What fixed that on your mind?
A. Hearing them say it.
Q. Did you think anything about it?
A. Not much.
Q. When did you next think about that?
A. About what?
Q. About that conversation?
A. I just heard them say it.
Q. Well, did you think anything more about it after they said it?
A. I just remember hearing them say it and that is all.
Q. When did you remember it again after that?
A. I never did forget it. I heard them say it.
Q. When was it next called to your mind? Did you think about it during that nine months?
217 A. No I just heard it, I just had a recollection of hearing them say it that is all.
Q. When did you next see the Reeves boys?
A. I do not recollect. I saw them around ever- once in a while.
Q. Did you ever see them with New after that?
A. No sir.
Q. Ever hear any more talk about it?
A. No sir. That is all I recollect of hearing them say.

Witness excused.

Mr. G. B. TROTTER, called and sworn for the defendant, testifies as follows:

Direct examination by Mr. H. M. FURMAN:

Q. Mr. Trotter I will ask you if Dick Reeves and Solon Reeves came to your place before the killing, when your boy was present, and ask- you if you had heard John New, *had heard John New* say

anything about them, and you said no. And they said he had been talking about them, and they had a notion to go up there and whip him?

A. Yes sir.

No cross examination. Witness excused.

Mr. BURROUGHS called and sworn as a witness for the defendant, testifies as follows:

Direct examination by H. M. FURMAN:

Q. Where do you reside?

A. Salyer, Texas.

Q. Do you know Dick Reeves?

A. Yes sir.

Q. Did you see him in Salyer on Thursday or Friday after Doyle was killed?

A. Yes sir. I think so, yes sir.

Q. Going back from the funeral?

A. Yes sir he said so.

Q. Did you have a conversation about this matter then?

A. Yes sir.

Q. Did he make this statement to you: That we, Reeves and Doyle was coming along the road and saw New, and he told
218 Doyle, Yonder is that fellow now, and you had better look out, and Doyle begun to get his pistol loose, it was pinned in, in the inside pocket of his vest, and New went and got his gun, and that he jumped out and run like hell and that Doyle kept on trying to get his gun until New shot one of his horses?

A. That is about what he told me as near as I can remember.

Cross examination by T. A. EDWARDS:

Q. Where do you live?

A. Sanger, Texas.

Q. How long have you lived there?

A. A little over a year the last time.

Q. Where had you been living before?

A. Collin county.

Q. Did you know John New there?

A. Yes sir.

Q. How long?

A. All my life.

Q. Related to him in any way?

A. No sir.

Q. Are you related to any of his family?

A. No sir.

Q. Where did you live at after you left, you say you lived in Collin county before you went to Sanger?

A. Yes sir.
Q. Where did you live before?
A. I was born in Grayson county. I lived in Collin county about all my life. Except when I lived in Sanger.
Q. When did you first make New's attorneys acquainted with the fact that Reeves made this statement to you?
A. I told my father and I suppose that he told New's father.
Q. How are you up here? Who brought you here?
A. I came on a summons.
Q. Who is paying your way?
A. Mr. New.
219 Q. Who was it that you slapped your hand on your pocket and told him that you was coming up here?
A. Maybe I did, yes sir.
Q. Do you know that constable at Sanger?
A. Yes sir.
Q. What is his name?
A. Stephens.
Q. Did you slap your hand on your pocket and tell him that you had the chink to come here with?
A. No sir.
Q. Where were you when this conversation took place?
A. In old man King's saloon.
Q. Drinking?
A. No sir.
Q. What was you doing?
A. I was only lounging around, not doing anything?
Q. Lounging round, what was said in there?
A. Dick came in and we spoke and I asked if there was any news. He said I suppose you have heard our trouble and I said no. He then told me.
Q. What did he tell you.
A. He said John New killed Doyle last Saturday. I asked him how came that and he told me that he and Doyle was driving along in a wagon, and that he told Doyle, Yonder is that fellow, he had better be on his guard or something like that, and he then began to try to get his gun unfastened. He said he had——
Q. Who said this?
A. Doyle—— *A.* He had it fastened in his inside vest pocket with a safety pin, and that New went and got his gun and began to shoot. And that the two first shots came nearly hitting him, then Doyle and I jumped out and run like hell, and Doyle jumped out and was trying to hold his horses and get his gun also,
220 and that New shot one of his horses and that they got away and run off. And that is about all.
Q. You know that Reeves told you that Doyle had a gun?
A. Yes sir.
Q. In his inside pocket?
A. Yes sir.

Q. Vest pocket?
A. Yes sir.
Q. Which side?
A. I do not know.
—. And pinned with a safety pin and he took hold of it and took it out.
—. Yes sir.
Q. How many efforts did he say he made to get it out?
A. He did not say.
Q. And he said that he jumped out and tried to get his pistol, kept trying?
A. Yes sir, that is what he said.
A. Yes sir that is what he said.
Q. And as soon as Doyle saw New he began to try to get his pistol?
A. He said he told him—And yonder is that fellow, and told him You had better be on your guard, and he then began to work at his pistol.
Q. Which side did he say it was on?
A. I do not know He did not say.
Q. He dropped his lines?
A. I do not know.
Q. All you know is that he made a surge?
A. I did not say anything about a surge. I said he just kept trying to get his pistol.
Q. He did not saw how?
A. No sir.

Stand aside. Witness excused.

221 Mr. W. J. TILLFORD, called and sworn as a witness for the defendant testifies as follows:

Q. Are you acquainted with Dick Reeves?
A. Yes sir.
Q. Did you meet him in the town of Port or West Wood on the morning before the killing of Doyle?
A. Yes sir.
Q. Did he state to you that he was going to Combs to stay until the small pox scare was over? And that he was going to raise a little hell and I asked him What kind and he said I would hear of it, and he said he was going to run John New off and I said Maybe John won't run, and he said If he don't I will kill him?
A. Yes sir.
Q. Did you know Doyle?
A. Yes sir.
Q. About the first of March, 1900, did you meet Doyle near Combs?
A. Yes sir.

Q. Did he make a statement to you in reference to New and if so please state what it was?

Objected to. Sustained. Exception.

By the COUNSEL FOR THE DEFENDANT: On what ground—I will state the ground on which I think it is competent.

By the COURT: Any threats made by Doyle, with no ground laid for them are incompetent.

Witness excused.

Mr. G. W. THARP called and sworn as a witness for the defendant testifies as follows.

Direct examination by Mr. FURMAN:

Q. You may state your name?
A. G. W. Tharp.
Q. Do you know the defendant, New?
A. Yes sir.
Q. How long?
A. About fifteen years.
Q. Where all?
222 A. No principally in Collin county and the Cheyenne country.
Q. How long have you lived here?
A. Something over a year.
Q. How long did you know him in Collin county?
A. I lived neighbor to him ten years, and then I lived in old Oklahoma five years, and then went back to Collin county and stayed five months.
Q. Do you know his general reputation in that community, where he has resided, for being a quiet, peaceable, law abiding man generally?
A. It was good.

Witness excused.

Mr. BROWN called and sworn as a witness for the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know the defendant?
A. Yes sir.
Q. How long?
A. About twenty years.
Q. How long have you lived here in this county?
A. Two years this coming December.

Q. State your acquaintance during that time whether you have known him well or not?
A. Yes sir.
Q. Can you tell the jury what has been his general reputation in the communities where he has lived for being a law abiding, quiet, peaceable citizen?
A. Why it has always been that way.
Q. Good or bad?
A. It has been good.

Witness excused.

Mr. WILEY WILLIAMS called and sworn as a witness for the defendant, testifies as follows:

Direct examination by Mr. FURMAN:

Q. Are you acquainted with the defendant?
A. Yes sir.
223 Q. How long have you known him?
A. Something near three years.
Q. Since he has been living down here near Combs?
A. Yes sir.
Q. Do you know what his general reputation has been down there as to being a peaceable, unoffensive, law abiding citizen or not?
A. Yes sir.
Q. Has it been good or bad?
A. It has been good.

Cross examination by T. A. EDWARDS, county att'y:

Q. Did you ever hear of him being in any trouble down there?
A. None except with Mr. Doyle.
Q. You heard of him being in trouble with him before?
A. With Doyle before this killing, yes sir.
Q. When?
A. Along in the spring or summer before.
Q. You know of them being in court?
A. Yes sir. A little case before the justice court I think. I heard of it. I was not present.
Q. Did New ever tell you how that trouble arose out there?
Q. What trouble? (By the witness.)
Q. Either one of them.

Objected to. Overruled. Exception.

A. I do not think that Mr. New ever told me how it originated as I remember of.

Witness excused.

Mr. MUMSEY called and sworn as a witness for the defendant:

Direct examination by Mr. FURMAN:

Q. Where do you reside?
A. Collin county, near Salina, Texas.
Q. Do you know the defendant?
A. Yes sir.
Q. How long?
224 A. Twenty-five years. Maybe something over.
Q. Where did you know him?
A. In our neighborhood.
Q. How far did you live from him?
A. I do not know, three or four or five miles. Sometimes closer. They rented.
Q. Do you know what his general reputation was down there in that community the time that you knew him, as to being a law abiding, peaceable, unoffensive citizen or otherwise?
A. It was good so far as I ever heard.

Cross examination by T. A. EDWARDS, county attorney:

Q. How far did New live from you?
A. Sometimes closer than others, three or four miles sometimes, and sometimes four or five.
Q. How long?
A. Twenty-seven years.
Q. Lived here all that time, who did you hear talk about him?
A. I do not know as I can state.
Q. Who did you hear state that he was a good man?
A. I saw him every few days and I saw him at my place, and through the neighborhood, and at the post office, and other places. I saw him every few days.

Witness excused.

Dr. CLAY *on* called and sworn for the defendant as a witness testifies as follows:

Direct examination by H. M. FURMAN:

Q. Where do you reside?
A. Salina, Collin county, Texas.
Q. Do you know the defendant?
A. Yes sir.
Q. How long?
A. Exactly I cannot tell. It has been ten or twelve, I expect or maybe fourteen or fifteen years.
Q. Did you live near him?
A. About three miles.

225 Q. Do you know what has been his general reputation in that community for being a quiet, peaceable, law abiding inoffensive citizen in that community?

A. It was good.

Witness excused.

Mr. JOHN PERKINS a witness for the defendant, called and sworn testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know the defendant John New?

A. Yes sir.

Q. How long?

A. I suppose about twenty-seven years. All his life nearly.

Q. How long did he live a neighbor to you, if at all?

A. Well he has lived five or six years right door neighbor, next door neighbor.

Q. During the time that you have known him have you known his general reputation as to being a peaceable, quiet and law abiding citizen or otherwise?

A. Yes sir. Yes sir as good as we had in our county.

Witness excused.

By the COURT: That is enough on that proposition.

By the COUNSEL FOR THE DEFENDANT: We have another witness or two on the same matters.

By the COURT: That is enough.

By the COUNSEL FOR THE DEFENDANT: Mr. New take the stand.

Mr. JOHN T. NEW, the defendant, sworn as a witness in his own behalf, testifies as follows:—

Direct examination by Mr. FURMAN:

Q. You live down here near Combs?

A. Yes sir.

Q. How long have you lived in this county?

A. About three years.

Q. Where did you come from?

A. Collin county, Texas.

Q. Did you ever have any trouble in your life with any man except Doyle?

226 A. No serious trouble, no.

Q. Please just tell the jury now in your own way beginning that morning, or that evening it was, in the evening that the trouble occurred and just tell the jury in your own way how you came to be out at the fence, and how that trouble came up.

A. Well in the evening, an hour by sun or perhaps an hour and one half, it had been a nice warm day and I had been sick.

Q. What was the matter?

A. The grippe and the measles on top of that. I was what I call on the puny list. I had been sick and had been indoors about two weeks or ten days, only about three days. I was anxious to stroll off for a little recreation. I thought I would go and kill some ducks.

Q. Was there any ducks in your pasture?

A. Yes sir, there is a creek there and you could see ducks flying around. It was a little ravine, I could see ducks lighting down that way. I thought I could go and get one or two or two or three I do not know just how many I did expect to get. I was down there and I did not kill any. They flew before I got close enough. I strolled on down that ravine, thinking I would find some more. I got down close to the section line, the big road a couple of hundred yards. I saw a steer out in the road that I thought was mine. I had some that had been getting out. I had some boys working on the fence. They had told me that they had not quite got it finished. Austin had. He was working for me at that time. I went down and it was my steer, and I got through the fence and laid my gun down. When I got through the fence I run him back right by the gate, it was a wire gate and he galloped in. The bottom wire being slack. He galloped in. I tacked up the wire. There was some steeples out of the post that held the wire up, when I got there. I taken a piece of wire off the post and went back to the gate. But before I got back I saw Doyle and Reeves coming, I supposed it was. I knew them and supposed it was them. I saw Doyle running around the horses that was loose. I thought they was going into
227 Lightfoot's house, he got out and headed them and gave them a scare and they came trotting down the road. And he taken the lines and came driving down. I started on down and they was at that time as much as fifty yards this side of Ben Lightfoot's place. Fifty yards closer than when I first saw them. I went down and began to work at the fence and I looked up and saw that it was Reeves and Doyle coming. I kept on working and looked up the second time. At that time they was in about forty or fifty yards. I saw Doyle reach in his bosom like that—indicating in his own bosom—and he began to jerk at something I supposed a pistol. I just reached down and picked up the Winchester and fired.

Q. Had you ever received any information as to any threats made by Doyle?

A. I had.

Q. State what?

A. My wife had told me at different times that he had made threats, and Mr. Powers had told me in Texas in January that Doyle had said that if things kept coming the way they was he was going to kill me.

Q. Had you had hard feelings with him?

A. Yes sir.

Q. How long standing?

A. We never had had serious trouble, it was in March a year ago. This was the first of March.

Q. What made you fire the first shot?

A. I was afraid he would kill me.

Q. What made you afraid, why was you afraid?

A. He had threatened to do so, and he reached into his bosom and I was afraid he would kill me.

Q. Tell what happened.

A. I shot the first shot and him and Reeves jumped out on the opposite side, I could only see their heads and I shot the second time. I had kept right with the wagon until they passed, and then the team had run by. And they was in plain view and I shot two or three times more.

228 Q. What was Doyle doing when in plain view?

A. Working at his breast trying to get his pistol out.

Q. What did Reeves do?

A. He turned and run back west. I do not know what he done, I saw him pass me going back west. I never looked to see.

Q. You say that after the team passed that you saw Doyle holding his hand there in his breast and you shot twice more?

A. Yes sir, I quit shooting when he was something like one hundred yards from me. I quit shooting. I ceased firing and he checked up, and turned and looked back, and commenced working at his breast again, like he was trying to get his pistol out.

Q. What did you do then?

A. I laid the gun on a post and shot him.

Q. What did he do?

A. He ran and kept running.

Q. Did you know whether you hit him that shot or not?

A. I thought I did. He throwed his hand on his leg and I thought I had hit him.

Q. What did you do?

A. I followed him to the house?

Q. What made you follow him?

A. I was afraid he would turn and shoot me.

Q. Was you out of shooting distance?

A. No sir.

Q. How far away was you?

A. About one hundred yards.

Q. You heard the testimony of Mrs. Trotter about what occurred at the door, that you promised her not to go in, if you made such a promise tell why you made it?

A. I did.

Q. Why.

A. Because I was afraid he would shoot through the door or out of the door and kill me while they was holding me.

229 Q. Did you go in the room?

A. I did.
Q. What did you do?
A. I shot him.
Q. What was he doing?
A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.
Q. What did you do?
A. I saw him there behind the door when I opened the door and I shot him as quick as I could.
Q. What was he doing?
A. Still working at his left breast.
Q. What did you do after you shot him?
A. Struck him with the gun.
Q. Where?
A. In the head.
Q. Did you do anything after that?
A. I turned and walked out.
Q. Where did you go, what about that horse?
A. I had a team there that had gone down for a load of hay, and a wagon, and I got a horse and got onto it.
Q. Where did you go?
A. I went back down to where the section line running north and south, and turned down and went south a mile or something like a mile, maybe a little over.
Q. Where were you going?
A. I though- I would go off some place for safety.
Q. Did you come back?
A. I did.
Q. What for?
A. I meant to state about that. I was bareback, and the horse I was riding was a poor backed horse, and he had been working all day. I had galloped off, and I thought if I had borrowed a
230 saddle, and then I thought it would bring, he had borrowed a saddle would be into trouble and I did not want to get any body into trouble for my troubles. I turned around and came back to the gate, up there where the firing first begun, and then I took a notion I would go down and see if he had any Winchester or shot gun in the wagon, in Doyle's wagon, and I rode down and looked in the wagon, and did not see anything. I then rode up towards home, started home.
Q. What do you mean when you went away for safety?
A. Well Dick Reeves and Solon Reeves and old man Reeves and Doyle were all enemies of mine, and I was afraid they would come up home and kill me, or I would have to kill some more—some of them.

No cross examination. Witness excused.

Mr. TILLFORD recalled for the defendant.

Direct examination by Mr. FURMAN:

Q. I will ask you if you ever heard Mr. Doyle make any threats against New, and if so state what and when?

A. About the first of March I met him about one half mile east of Combs. He stopped and spoke. And said Where have you been? I said Down to New's. And he said I want to ask you one question. He said Did you ever hear him say anything about me? I said No. He said He does talk about me and I will stop it. If I ever get him in the right place, some powder will burn.

Cross examination by Mr. EDWARDS, county attorney:

Q. That was Reeves?

A. No sir, Doyle.

That is all.

Witness excused.

Mr. W. F. THARP, recalled for the defendant.

Direct examination by Mr. FURMAN:

Q. Where do you live?

A. Clinton county, Texas.

Q. Did you know the deceased in his life time?

A. Yes sir.

Q. I will ask you if about the first of May, 1900, the first
231 day of May, last year you was in this Territory?

A. Yes sir.

Q. At Doyle's house?

A. Yes sir.

Q. And was John Ferris with you?

A. Yes sir.

Q. If Doyle said anything about New, made any threats, tell the jury what he said.

A. Yes sir he made some threats. The first thing that was said was that they had had some trouble and had had a trial at Woods.

Q. What did he say?

A. He said that he could not get justice in the courts, and was going to take the thing in his own hands, he was going to revenge himself.

Q. Did he show you anything?

A. Yes sir.

Q. What?

A. A six shooter.

Q. What kind?

A. A large blue looking pistol. Black handled.

Q. Did he say how he came to get it.

A. He said to revenge himself with and to protect himself with.
Q. Who was he talking about?
A. John New.
Q. What did he say about his habit of carrying it with him? Did he say anything about carrying it?
A. Yes sir he said he carried it every where he went?
Q. Did he say anything about any previous difficulty or feeling between him and New? Q. About any past difficulty between him and New?
A. No sir I don't know as he did.
Q. About any trouble that he had had with New before?
232 A. Yes sir.
Q. What did he say?
A. He said that they had had some trouble I do not recollect, how he did bring that in. He said so much about it.
Q. Did he say anything about a boot leg?
A. Yes sir, he said in the field he had his pistol in his boot leg, and was in an unhandy place, and could not get it out, or he would have killed him that day.
Q. Did you see New after that?
A. Yes sir.
Q. I mean Doyle after that?
A. Yes sir.
Q. Where?
A. At his fence in passing by. In passing the road.
Q. Did you have any conversation then?
A. Yes sir.
Q. What was it?
A. Well he asked me if I had a place yet and I said I did not. He said he knew where I could contest and get one. I asked where and he said I could contest New, and get one.
Q. What else did he say?
A. Well he said I could contest him and get his place.
Q. Now tell the rest of it? If he did say anything more.
A. I cannot recollect hardly what he did say.
Q. Did you give him any advice to drop his trouble?
A. Yes sir, I told him he had better drop it. He said he would not do that it had gone too far. He said that he intended to kill him ever since he accused his brother Jim of stealing a horse in Collin county sometime before.

Cross examination by Mr. T. A. EDWARDS, county attorney:

Q. When was this?
A. I think about the first of May, 1900.
Q. About a year before this trouble occurred?
233 A. Yes sir.
Q. Where were you when you had this conversation?
A. In the road at Doyle's house.

Q. Was that about the time of this old trouble?
A. Yes sir.
Q. It was immediately after they had been in court?
A. Yes sir.
Q. He did not tell you about that trouble?
A. Yes sir.
Q. And said that he had a pistol?
A. Yes sir.
Q. And said that he had run?
A. No sir.
Q. Did he not tell you that he had run into the house?
A. No sir.
Q. New, he said he had come out there in the field.
A. I do not remember, I think he said so.
Q. You live in Collin county?
A. No sir, Denton county.
Q. How long have you known the defendant?
A. 13 or 14 years.
Q. A particular friend of the defendant's?
A. No sir.
Q. Have been very active in looking up the evidence in this case?
A. No sir.
Q. When did you tell the defense in this case about this?
A. I do not know, I did not tell them before the trial commenced. I told them before the trial commenced.
Q. You wanted to be a witness?
A. No sir.
Q. You came here all the way from Texas didn't you?
A. Yes sir.
Q. Very much interested?
A. Yes sir.
234 Q. Want to see him get out of it?
A. Yes sir I would like to.

Witness excused.

Mr. JOHN W. HOWELL called as a witness on behalf of the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know Henry Doyle?
A. Yes sir.
Q. Was you at his house in 1900?
A. I was at his house in August, 1900, never met him before
Q. Where do you live?
A. Texas.
Q. What part?

A. Collin county.
Q. What part?
A. Roselyn post office.
Q. In August, 1900, did you have any conversation with the defendant New?
A. Yes sir, I stopped with him one night in 1900, and was looking over this country for a place, and asked him for information in regard to where I could find a place, and I told him about the amount of means that I had to pay for a place.
Q. Tell what he said?
A. He said he could tell me of a claim that would beat buying one.

By the COURT: Do not state anything that he said except as to the personal safety of New.

(NOTE BY THE STENOGRAPHER)—On page 174 where the question appears "In August 1900, did you have any conversation with the defendant, New," the attorney for the defendant probably made a mistake in the name, and may have meant Doyle, as would seem to be indicated by what follows.)

235 A. He spoke of some difficulty, and he said that he regretted that he didn't kill him at that time.
Q. Was anything said about what he would do in the future?
A. He said if the same opportunity was afforded again he would do it.

Cross examination by T. A. EDWARDS, county attorney:

Q. Did he tell you about that trouble?
A. Yes sir he said something of it.
Q. Did he say that New came into his own field with a gun? Did he tell you that?
A. No sir, he said something about throwing a piece of metal.
Q. Who?
A. New.
Q. That was in Doyle's own field?
A. I do not know. He was telling me about that a short time after it happened. I do not know.
Q. Did he not tell you that after New came out—did he not tell you that if New came out into his own field on him again that he would protect himself, or that he would do so and so.
A. No sir.
Q. Did he say something to amount to that?
A. I did not understand it that way.
Q. Do you know whether you understood it as he meant it?
A. I just understood that if the same opportunity, whatever it was, but what the conditions were before I did not understand.
Q. You live in Texas?
A. Yes sir, Collin county.

Q. When did you communicate your information to the defense?
A. I never did.
Q. How did they know, how do you come to be here?
A. They subpœn-ed me.
Q. And they are paying your way?
236 A. I am paying my own way.
Q. Paying your own way?
A. I do.
Q. You are pretty much interested?
A. I do not know as I am.

Witness excused.

Mr. W. A. POWERS called as a witness for the defendant, testifies as follows, after being first duly sworn.

Direct examination by Mr. FURMAN:

Q. Did you know the deceased in his life time?
A. Yes sir.
Q. I will ask you if you met Doyle in April, 1900, down in Texas?
A. Yes sir.
Q. Now under the ruling of the court, and it is the law, you can tell no preliminaries, just come to the point. I will ask you if Mr. Doyle said anything to you about Mr. New in the line of a threat, leave out everything else?
A. Yes sir.
Q. Tell the jury what it was. Leave out every other matter and come to the point.
A. He asked me if I had done threshing for him. He said Mr. New was telling out here that he could not get hands to help him. I told him he always had got help, that New helped him the year before. I asked him if they was still at outs and I said he had better drop it. And he had better drop it. He said no, he would kill him first.
Q. Did you communicate that to New?
A. Yes sir.
Q. Where?
A. In Texas.
Q. What did you tell him?
A. I told him to watch him that he might kill him, that he appeared to be pretty mad at him.

Witness excused.

237 Mr. MCCARTY called as a witness for the defendant, and being duly sworn, testifies as follows:—

Q. Where do you live?
A. Southwest of here.

Q. Did you know Doyle in his life time?
A. Yes sir.
Q. Now just leave out, I want to come right down to the point, any preliminary conversation. If you ever heard Doyle make any threat to kill New, tell it and leave the rest out.
A. Yes sir.
Q. Just tell what you heard him say.
A. I heard him say he would kill him before the year was out.
Q. You heard him say that?
A. Yes sir.
Q. Did he say why or put any ifs in it?
A. No sir.

Cross-examination by T. A. EDWARDS:

Q. When?
A. Last year, July or August.

Witness excused.

Mr. JOHN FERRIS called and sworn for the defendant, testifies as follows:

Direct examination by Mr. FURMAN:

Q. Did you know Doyle in his life time?
A. Yes sir.
Q. Sometime in May, 1900, was you at his house with Tharp?
A. Yes sir.
Q. Did he make any threats about New at that time?
A. Yes sir.
Q. Tell the jury what he said, the threats and leave the other part out.
A. Well to the best of my recollection he said he had tried the court, justice of the peace, and had failed, and that he was
238 going to take it in his own hands that he had failed to get justice in the court.
Q. Did he show you anything?
A. Yes sir.
Q. What?
A. He showed us a gun.
Q. What kind of a gun?
A. It was a black handled pistol.
Q. Large or small.
A. It looked to be a forty four.
Q. Did he say anything about how he came to get it or anything of the sort, or what for?
A. He said he had a good gun, and showed it in his vest pocket, and was going to kill New.

Q. Was going to kill whom?
A. New.
Q. Did he say anything about any troubles between him and New or anything?
A. Yes sir.
Q. What did he say about that?
A. Well he said that New had intimated that his brother had stolen some horses, and that he had made up his mind to kill him ever since he had made that statement.
Q. Do you know what his habit was as to carrying his arms?
A. I saw him several times with a shot gun.
Q. Do you know how it was loaded?
A. He told me once it was loaded with buckshot.
Q. Did he say what his custom was what kind of shot he was in the habit of loading it with?
A. No sir.

Cross examination by T. A. EDWARDS, county attorney:

Q. This talk was in May, 1900?
A. About that time.
239 Q. Just after that other trouble they had had there in the courts.
A. Yes sir.
Q. He told you about that trouble didn't he?
A. Yes sir.
Q. And told you about New coming into his own field onto him did he not?
A. Well he told something about them having a difference down about the field.
Q. You say that you saw him with a shot gun?
A. Yes sir.
Q. Did you ever see anybody else out there with a shot gun?
A. Yes sir.
Q. Ever see New with a gun?
A. Yes sir.
Q. Did you ever see him with a pistol?
A. No sir.
Q. Did you ever let him have a pistol?
A. I believe I did.
Q. Just before that other trouble didn't you?
A. I let him have a pistol some time shortly after I moved there.
Q. He had your pistol at the time that he went into the field on Doyle didn't he?
A. I do not know.
Q. Was your pistol at home then?
A. I do not recollect.
Q. Now do not you remember that the time of that conversation that Doyle told you that that trouble came up, out there in the field,

at the time that Doyle was talking to you did he not tell you that the trouble that he and New had was out there in Doyle's field?

A. Yes sir.

Q. And about New coming over into his field?

A. Yes sir, something of that sort, something about some cattle.

240 Q. And of New throwing a piece of metal at him?

A. No sir.

Q. Did he say anything about New making a gun play at him? Did he not say that New drew a gun on him in the field, a pistol.

A. To the best of my recollection he did.

Q. And that was your pistol?

A. I do not know.

Witness excused.

The defendant rests.

By the COURT: Any rebuttal?

By the COUNTY ATTORNEY: No sir. The Territory rests.

TERRITORY OF OKLAHOMA, *County of Canadian,* } ss:

I, T. F. Millikan, court reporter of the above named court, do hereby certify that the above and foregoing is a full, true, complete and correct transcript of my short-hand notes of the evidence in said cause, taken at the trial thereof, and that the same is a full, true, complete and correct transcript of all the evidence introduced in the trial of said cause.

T. F. MILLIKAN,
Court Reporter.

That thereupon, and at the close of the testimony for the plaintiff and defendant in said cause, the court instructs the jury as to the law, in writing, which said instructions and the exceptions saved thereto, are in words and figures as follows, to-wit:

241 TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW. } Defendant's Request No. 5.

You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun-shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant.

Refused, exception by defendant. C. F. I., judge.

Endorsed on the back as follows—317—317. Territory vs. New—Defendant's request for instructions. Instruction asked by defendant and refused. Judge. Filed 10–16–1901—E. M. Hegler, cl'k.

The court instructs the jury that under the laws of this Territory the killing of a human being is murder in the following cases:

1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death, by a person in the commission of a felony.

242 The jury are instructed that under the laws of this Territory homicide is excusable in the following cases:

1st. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, provided that no undue advantage is taken, or any dangerous weapon used, nor the killing done in a cruel or unusual manner, and under the laws of this Territory homicide is justifiable when committed by public officers, and those acting by their command, and their aid and assistance in the following cases:

1. In obedience to any judgment of any competent court.

2. When necessarily committed in overcoming actual resistance, to the execution of some legal process, or to the discharge of any other legal duty.

3. When necessarily committed in retaking felons, who have been rescued or who have escaped, or when necessarily committed in arresting felons fleeing from justice.

Under the laws of the Territory of Oklahoma, homicide is also justifiable when committed by any person in any of the following cases

1. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house, in which such person is.

2. When committed in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished.

243 3. When necessarily committed when attempting by lawful means to apprehend any person for any felony committed, or

in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

The jury are instructed further that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and acquit the defendant unless they feel compelled to find him guilty as charged, by the law of the land and the evidence of the case, convincing them of his guilt as charged, beyond all reasonable doubt.

3. Given, C. F. I. judge. Exception by defendant.

The jury are instructed that under the laws of this Territory the defendant in a criminal case is a competent witness in his own behalf, and the jury have no right to disregard his own testimony from mere caprice, and from the fact alone that he is the defendant, and stands charged with the commission of a crime, but, taking into consideration his interest in the event of the suit, they should weigh his testimony in the light of all the other facts and circumstances in evidence, and should give it such weight as they believe it justly entitled to.

4.

244 The jury are instructed that the defendant has put in evidence his general reputation as a person of quiet and peaceable disposition and such testimony is permissable under the law, and is to be considered by the jury as a circumstance in the case. But you are further instructed that if, from all the evidence in the case, you are satisfied beyond a reasonable doubt, of the guilt of the defendant, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a good reputation as a person of peaceable and quiet disposition.

5.

The court instructs the jury that the law is if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or suffering great bodily harm he will be justified in defending himself, although the danger be not real but only apparent. Such person will not be held responsible criminally, if he acts in self defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm, before he may slay his assailant, it is sufficient, if, in good faith, he has a reasonable belief, from the facts as they may appear to him at the time, that he is in such imminent peril.

6. Given, C. F. I. judge. Exception by defendant.

245 As a matter of law no one has a right to kill another, even in self defense, unless such killing is apparently necessary for such defense. Before a person can justify taking the life of a human being, on the ground of self defense, he must, when attacked, employ

all reasonable means within his power, consistent with his safety to avoid the danger and avert the necessity for the killing.

7. Given, C. F. I., judge. Exception by defendant.

While it is true that homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death, or great bodily harm from the deceased, and that his act in causing death was necessary, in order to avoid the death or great bodily harm, which was apparently imminent, *but* when there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or a violation of law on his part is the reason of his expectation of an attack, the plea of self defense cannot avail.

8. Given, Exception by defendant. C. F. I. judge.

The jury are instructed that justifiable homicide is the killing of a human being in self defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise, to commit a felony on either. A bare fear of any of these offenses, is not sufficient to justify the killing.

It must appear that the circumstances were sufficient, to excite the fears of a reasonable man, and that the party killing acted under the influence of those fears.

9. Given, C. F. I. judge. Exception by defendant.

246 Your personal opinions as to facts not proven cannot properly be considered as a basis for your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that and that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinions or presumptions not founded upon the testimony.

10. Given, Exception by defendant. C. F. I. judge.

If after a candid comparison and careful consideration of all the evidence in the case, you have a doubt of the defendant's guilt, it will then be your duty to determine whether such doubt is reasonable and sufficient in law to acquit the defendant. And if after applying the law defining such doubt, as laid down in these instructions, you find that the doubt in question is not a reasonable one, then it is not sufficient in law to acquit the defendant. A doubt to justify an acquittal must be a reasonable one, *must be a reasonable one*, and it must arise from a candid and careful investigation of all the evidence in the case, and unless the doubt is a reasonable one, and does so arise, it will not be sufficient in law to authorize a verdict of not guilty.

11. Given, C. F. I. judge. Exception by defendant.

The jury are instructed that while the law requires that before a conviction can be had in a criminal case, the evidence must be so strong as to exclude from their minds all reasonable doubt of the guilt of the defendant, yet if after hearing all the evidence, and if after a fair, candid and impartial investigation and examination of

all the evidence, facts and circumstances in evidence in the case, the jury can say on their oath as jurors and their conscience as men, that they have an abiding faith in the truth of the charge contained
247 in the indictment, amounting to a moral certainty, then they are convinced beyond a reasonable doubt.

12. Given. Exception by defendant. C. F. I. judge.

The court instructs the jury that as a matter of law whoever is guilty of murder shall suffer punishment of death, or imprisonment for life at hard labor.

13.

The jury are instructed that if they find the defendant guilty of murder, they shall designate by their verdict whether he shall be punished by death or by imprisonment for life at hard labor.

14.

The jury are instructed that any testimony admitted by the court as to statements made by the witness Reeves, out of court, contrary to his sworn testimony, are only admitted for the purpose of impeachment. They are not of themselves any evidence that the defendant, New, acted in self defence at the time of the homicide, and the jury have no right to consider them for this purpose, except in so far as they tend to impeach the witness, Reeves.

15. Given / Exception by defendant. C. F. I. judge.

248 The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm, in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense.

15½. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that although they may believe from the evidence that at some time previous to the commission of the homicide, the deceased had made threats against the life of the defendant, and that such threats had been communicated to the defendant, and in consequence of such threats the defendant had prior to the homicide entertained fear that the deceased would do him bodily harm, and although they may believe from the evidence that in consequence of such threats and on account of the actions of the deceased just prior to the homicide, the defendant may have had fears that the deceased would do him some bodily harm at some future time, such fears would not justify the defendant in slaying the deceased but before the defendant can justify his action in slaying the deceased, it must appear from the evidence that such slaying was necessary, or appeared to be necessary in a reasonable and necessary defense of the defendant's life, and if the jury believe from the evidence in this case, that the defendant sought the deceased for the purpose of killing him, and that at the time the fatal shot was fired, there was no actual or apparent danger to the life or person of the defendant, from the deceased, and no grounds for a reasonable belief

thereof, in the mind of the defendant, then the killing of the deceased was not justifiable on the grounds of self defense.

16. Given. Exception by defendant. C. F. I. judge.

249 If the jury believe from the evidence beyond a reasonable doubt that at the time the fatal shot in this case was fired, by the defendant, the deceased had retreated from the defendant, and was at the time making no demonstration which indicated an intention on his part, to do the defendant any bodily harm, and that the defendant at the time was in no immediate or apparent danger of death, or great bodily harm, then the killing of the deceased by the defendant, is not justifiable on the grounds of self defense.

17. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that although they may believe from the evidence that before the defendant, New, fired the first shot, at the deceased, that the deceased made some demonstration which indicated an intention on his part to draw a gun, and that said New at that time had reason to believe, and did believe, that the deceased was about to draw a gun, for the purpose of assaulting the defendant, *at* that said New at said time believed his life or his personal safety was in imminent danger, yet, if they further believe from the evidence beyond a reasonable doubt, that before the fatal shot was fired the deceased had withdrawn from the scene of action, was fleeing from said New, and had retreated to a place of safety, and that said New followed the deceased, after the real or apparent danger was over, and without any reasonable belief on the part of said New that his life or personal safety was in imminent danger, said New shot and killed the deceased, in manner and form as charged in the indictment, then said New is guilty of murder and the jury should so find.

18. Given. Exception by defendant. C. F. I. judge.

250 The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant, New, could have withdrawn from the scene of the tragedy, with safety and could have gone away, from the scene of action with safety, to his life and person, without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and if you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary, in a reasonable and necessary defense of the life or person or habitation of said New, at the time of said homicide, then your verdict should be guilty of murder.

19. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that any fears that the defendant may have entertained of the deceased prior to the time of the homicide, as a result of any threats shown by the evidence as having been made by the deceased against the defendant, or any fears that the defendant may have entertained at the time of the homicide, that the deceased would do him bodily harm at some future time, will not be a proper basis for a plea of self defense, unless you believe

from the evidence that at the time of the homicide, the defendant had a belief based upon reasonable evidence that his life or personal safety was in imminent danger from the deceased at that time.

20. Given. Exception by defendant. C. F. I. judge.

251 The jury are instructed that your verdict in this case should be based entirely upon the evidence, facts and circumstances in evidence in the case, together with the law as given to you by the court, and if from all the evidence and the law, you are satisfied beyond a reasonable doubt that the defendant is guilty in manner and form as charged in the indictment, then you should find him guilty, that you have no right as jurors to go beyond the evidence to hunt up doubts, or to entertain doubts which are merely conjectural, and do not arise from a fair, candid, and careful investigation of all the evidence in the case, neither have you the right as a juror to doubt because you have sympathy for the defendant or the family of the defendant, or because a verdict of guilty would cause grief or sorrow to the defendant or his family. These are matters which you have a right to consider as men, but as jurors you have no right to allow them to in any degree enter into or cause you to form therefrom your verdict; you have no right as jurors to ignore, set aside or disregard the instructions of the court, as given you as the law of this case, but it is your sworn duty as jurors to decide this case solely upon the evidence, facts and circumstances in evidence as developed by the testimony, and the law as given to you by the court.

21. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that these instructions should be taken as a whole, as the charge of the court giving the jury the law of this case, and they are further instructed that they are binding upon the jury, as the law of the case, and the jury have no right to disregard them, in determining the issues in this case.

22.

252 1. Asked by the Territory. Given. Exception by the defendant C. F. I. judge.

The defendant seeks to justify or excuse the killing on the ground of threats made by Doyle, to take his life and on the ground of self defense. Now threats by Doyle to kill New do not afford a justification for New killing Doyle, unless it be shown by the evidence that at the time of the killing Doyle by some act then done, manifested an intention to kill New or do him some great bodily harm. If the defendant at the time of the killing had a reasonable apprehension that it was the intention of Doyle to make an immediate assault on him, and take his life or do him some great bodily harm, he had the right to defend himself and it would make no difference whether the danger was real or imaginary so that it had the appearance of being real, and in determining the question of apparent danger, you should look at the facts from the defendant's stand-point. But in order for New to justify himself on this ground, you must believe from the evidence that the circumstances surrounding the

parties was such as to create and did create in the mind of New a *bona fide* apprehension on the part of New, that it was the intention of Doyle to make an immediate assault on him, the defendant, and take his life or do him some great bodily harm, and if you believe that the said Doyle, by some act done, or word spoken at the time of the killing, created in the mind of New a just and reasonable apprehension, of death, or serious bodily injury, and that the said New shot and killed the said Doyle, to defend himself from such danger, if any there existed, then you will find the defendant not guilty.

The defendant New had no right to kill Doyle under the apprehension that Doyle might kill him at some future time, and if you find that was the motive that induced New to kill Doyle, then he could not justify the killing on the ground of self defense.

253 II.

Where a defendant accused of murder seeks to justify himself on the grounds of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed by some act then done, manifested an intention to execute the threats so made.

Given. Exception by defendant. C. F. I. judge.

III.

Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances, reasonably indicate to be necessary.

Given. Exception by defendant. C. F. I. judge.

In no case can the killing of a human being be justified upon the ground of self defense, if the human being killed is in a terrified flight, and has passed completely away from the scene of the difficulty, and is merely seeking to save his life by flight at the time he is killed, and the party who does the killing has been in pursuit of the retreating human being for such a time, that he has time, as a reasonable human being, to know that the person killed is in flight, and not in fight.

4. Given. Exception by defendant C. F. I. judge.

254 TERRITORY
vs.
NEW.

No. 1.

At the request of the defendant the court instructs the jury — follows:

The jury are instructed as a matter of law, that if a person believes, and has a reasonable cause to believe that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary, (if necessary,) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable upon the ground of self defense.

Modified by interlineation "(if necessary)" and given.

Interlineation excepted to by defendant. C. F. I. judge.

" complained of in parenthesis.

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. 2.

In this case, the defendant pleads that in taking the life of the deceased, Doyle, he acted upon reasonable appearances of danger, of being killed by the deceased, or of receiving serious bodily harm at the hands of the deceased. In passing upon this defense, it is your duty to view the facts and circumstances occurring at the time of the killing, from the defendant's standpoint, as they then reasonably appeared to him.

Given. C. F. I. judge.

255 TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. 3.

Threats made by the deceased to take the life of the defendant, or to inflict serious bodily harm upon him, would not of themselves justify the defendant in killing the deceased. But if you find from the evidence that the deceased had threatened to kill the defendant,

or to inflict serious bodily injury upon him, and that those threats had been communicated to the defendant, prior to the killing, and that the deceased did some act just prior to (and at the time of) the killing, which manifested and indicated to the defendant, an intention on the part of the deceased to carry these threats into execution, and defendant then believed that deceased was about to assault him, and execute such threats, then the defendant would be justifiable in taking the life of the deceased, (but this would not justify the defendant in pursuing the deceased and killing him after the real or apparent danger was past).

Modified by interlineation (and at the time of) and by adding the words (But this would not justify the defendant in pursuing the deceased, and killing him, after the real or apparent danger was past).

Exception by defendant. C. F. I. judge.

256 THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. Four.

To excuse himself in this case, upon the ground of self defense, it is not necessary that the defendant should have been in actual danger of losing his life, or of having serious bodily injury inflicted upon him by the deceased. It is sufficient in law, to justify the defendant in taking the life of the deceased, if, at the time of the homicide, it then reasonably appeared to the defendant from the acts of the deceased, considered in connection with the previous threats of the deceased, if any such threats appear from the evidence to have been made, that it was then the intention of the deceased to kill the defendant or to inflict serious bodily injury upon him, and, if you so find from the evidence, or, if from the evidence you entertain a reasonable doubt as to whether the defendant actually believed he was in danger, and such belief was based upon reasonable evidence of danger, and made the fatal assault while acting under such belief, you will acquit the defendant, although as a matter of fact, the defendant was in no actual danger at the hands of the deceased, at the time of the killing (provided you further believe from the evidence that the defendant believed such killing was necessary for such defense).

Modified by interlineation and additions as shown by parenthesis Exception by defendant. C. F. I., judge.

Said instructions indorsed on the back as follows: 317 Territory vs. New. Instructions. Filed 10–16–1901. E. M. Hegler, clerk.

That during the argument of said cause, and immediately following the giving of the instructions to the jury by the court as to the

law of said cause, the defendant, by his attorney files his bill of exceptions No. 1 in said cause which is in words and figures as follows, to-wit:—

257 In the District Court, County of Washita.

THE TERRITORY }
vs.
J. T. NEW. }

Bill of Exceptions.

1. Be it remembered that on the trial of said action the defendant excepted to each of the instructions given by the court on its own motion, numbered from No. 1 to No. 22 inclusive.

2. The defendant then and there also excepted to the giving of each of the instructions requested by the prosecution from No. 1 to No. 3 inclusive.

3. The defendant then and there also excepted to the modifications of defendant's request for instructions, in requests No. 1–3 and 4 inclusive.

4. The defendant also excepts to refusal of the court to give request No. 5 as made by defendant.

5. The defendant then and there also excepted to the instructions of the court, and to each thereof, on the grounds that the same fail, and each fails to present the law governing the case.

Allowed, C. F. Irwin, judge.

And said matters not being otherwise of record herein the said exceptions are hereby allowed and the same shall be made of record herein.

Indorsed: 317. Territory *vs.* New. Bill of exceptions. No. 1 Filed Oct. 16, 1901. E. M. Hegler, clerk.

That thereupon, and immediately following the instructions of the court to the jury, the counsel for the Territory, and the counsel for the defendant, argue said cause to the jury; that during the argument of said cause to the jury by the counsel for the Territory, the defendant by his attorney files his bill of exceptions No. 2 which bill of exceptions No. 2 and the endorsements thereon by the court and the clerk of said court, is in words and figures as follows, to-wit:

258 TERRITORY }
vs.
NEW. }

In the closing remarks of the counsel for the Territory the counsel said:

"Forrest and Furman bring this young fellow who hangs around

saloons in Texas to show what Dick Reeves said, why did they not get the written testimony of Dick Reeves taken before the coroner's jury, on the night after the murder. Why did they not get the justice who held the inquest, and heard Dick Reeves testify, to contradict him."

To these remarks the defendant excepts on the grounds that there is no evidence in the case which shows that any testimony was taken down in writing before the coroner's jury, and no evidence that Dick Reeves was a witness before such jury, and defendant requests the court to disregard the statements of counsel in said matter.

No such statement was made by counsel, and what counsel did say was not objected to at the time.

Refused by court. C. F. Irwin, judge.

Endorsed: 317 Territory *vs* New. Bill of exception No. 2. Filed 10–17–1901. E. M. Hegler, clerk.

TERRITORY OF OKLAHOMA, } *ss*:
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on the 17th day of October, 1901, the same being the third judicial day of the district court of said county, district and Territory, aforesaid, for the regular October term, 1901, thereof, the court having been duly opened for the transaction of business the following proceedings among others were had, to-wit:

259 TERRITORY OF OKLAHOMA } #317.
vs.
JOHN NEW, Defendant. }

Comes now the Territory by its attorneys and the defendant in person into open court and by his attorneys; come also the jury in charge of their sworn bailiffs and all being present the trial of this cause is resumed. And now the defendant resumes and concludes his argument and the prosecution makes its closing argument. Whereupon the court submits the cause to the jury and swears bailiffs to take charge of them and said jury retire in their charge to consider of their verdict.

TERRITORY OF OKLAHOMA }
v.
JOHN NEW, Defendant. }

And now the defendant being present in person in open court and by his attorneys and files by his attorneys his bill of exceptions No. 2, which is refused by the court.

TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant.

Comes now defendant in person into open court and by his attorneys; comes also the jury in charge of their sworn bailiffs and all answer present. And now the jury by and through their foreman return and present the following verdict, to-wit:

"In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Verdict.

We, the jury, duly empaneled and sworn to try the issues
260 in the above entitled cause do upon our oaths find the defendant guilty of murder and fix his punishment at imprisonment for life at hard labor.

WILLIAM S. PETTY, *Foreman.*

In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Verdict.

We, the jury, duly empannelled and sworn to try the issues in the above entitled cause do upon our oaths find the defendant guilty of murder and fix his punishment at imprisonment for life at hard labor.

WILLIAM S. PETTY, *Foreman.*

Endorsed: 317—Territory *vs.* John New. Verdict. Filed 10-17-1901—E. M. Hegler, clerk.

Whereupon the court discharged said jury from further consideration of this case and announces Saturday morning, October 19, 1901, at 9 a. m. as date for hearing of motion for a new trial and for passing of sentence and remands the defendant to the custody of the sheriff.

261 TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant.

It appearing to the satisfaction of the court that the county jail of Washita county, said Territory, is insecure for the confinement of prisoners,

It is ordered by the court that the sheriff be and hereby is allowed six guards to assist in guarding said jail until further order of this court at the expense of Washita county, Oklahoma.

Ordered that court stand adjourned till tomorrow morning, October 18th, 1901, at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

That thereupon, and on the 18th day of October, 1901, the defendant, by his attorneys, files in said court his motion for a new trial in said cause, which said motion for a new trial is in words and figures as follows, to-wit:—

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.
Motion for New Trial.

Comes now the defendant in the above entitled action, and moves the court to vacate and set aside the verdict of the jury in said action, and to grant the defendant a new trial therein, on the following grounds:—

First. The court erred in misdirecting the jury in matters of law, in the trial of said cause.

Second. The court erred in failing to direct the jury in matters of law as requested by the defendant, in said trial.

262 Third. The court erred in its decisions on questions of law, arising during the course of the trial.

Fourth. The court erred in failing to charge the jury that under the law, it might convict the defendant of manslaughter in the first degree.

Fifth. The court erred in weighing the evidence in said trial and in taking from the jury, the duty of determining in their verdict, the degree of homicide, of which the defendant should be convicted, if of any degree.

Sixth. The instructions of the court are erroneous, in that they are conflicting, and tend to confuse the jury as to the law of the case.

Seventh. The court erred in failing to state in its instructions to the jury the issues of fact submitted to the jury for its consideration.

Eighth. The court erred in giving its instructions number three.

Ninth. The court erred in giving the court's instructions numbers 5, 7, 8, 10, 11, 12, 15, 15½, 16, 17, 18, 19, 20 and 21.

Tenth. The court erred in giving the Territory's request for instructions numbers 1, 2, 3, and 4.

Eleventh. The court erred in modifying the requested instructions of the defendant, numbers 1, 2, 3 and 4.

Twelfth. The court erred in refusing the defendant's requested instructions number 5, to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW. } Defendant's Request No. 5.

You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased—that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds, or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant.

Refused. Excep- by defendant. C. F. I. judge.

263 Thirteenth. The verdict of the jury is contrary to the law.

Fourteenth. The verdict of the jury is contrary to the evidence. That the substantial rights of the defendant are prejudiced by said verdict, to each and all of which said errors, the defendant duly excepted during said trial.

H. M. FURMAN,
FORREST, LOWE AND SCHILLER,
MASSINGALE AND AUXIER,
Attorneys for Defendant.

Endorsed: No. 317—Territory *vs.* John T. New. Motion for new trial—Filed Oct. 18, 1901. E. M. Hegler, clerk.

That thereafter, and on to-wit, the 19th day of October, 1901, the defendant, by his attorneys filed in said court, his motion in arrest of judgment, which said motion in arrest of judgment is in words and figures as follows, to-wit:—

TERRITORY
vs.
NEW. } Motion in Arrest of Judgment.

Comes now the defendant and moves in arrest of judgment on the grounds that the indictment does not state facts sufficient to constitute a public crime.

H. M. FURMAN,
FORREST, LOWE AND SCHILLER,
A. M. MASSINGALE, *Att'ys for Defendant.*

Endorsed on the back: No. 317. Territory *vs.* New. Motion in arrest. Filed Oct. 19, 1901. E. M. Hegler, clerk.

264 TERRITORY OF OKLAHOMA, } ss :
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on this 19th day of October, 1901, the same being the 5th judicial day of the district court of said county, district and Territory, aforesaid, for the regular October term, 1901, thereof, the following proceedings among others were had, to wit:

THE TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant. } Judgment and Sentence.

Comes now the defendant in person into open court and by his attorneys, and this being the day set for hearing on the motion for a new trial and for judgment and sentence on the verdict of the jury heretofore rendered in this cause the said motion came on for hearing by the court and the court after argument of counsel and being duly advised in the premises overrules said motion to which ruling the defendant excepts and exceptions allowed, and now the court directs the said defendant to stand for judgment and sentence on said verdict, and informs him of the nature of the charge against him, his plea of not guilty thereto, and the verdict of the jury thereon, and asks him if — has any reasons to state why the judgment and sentence of the court should not be pronounced upon him and said defendant having no sufficient reason to assign, the court finds: that said defendant is by the verdict of the jury "guilty of murder and his punishment fixed at imprisonment for life at hard labor."

265 It is therefore ordered, considered and adjudged by the court that the defendant, John T. New, be confined and imprisoned for the period of his natural life at hard labor in the territorial penitentiary at Lansing in the State of Kansas. And the sheriff of Washita county, said Territory, transport and deliver the said defendant to the warden or other proper keeper of said penitentiary and take his receipt therefor and the said warden or other proper keeper of said penitentiary is ordered to receive and confine said defendant in said penitentiary according to the terms and commands of this judgment and sentence and a certified copy of this judgment and sentence shall be his full warrant and authority for so doing.

And now the court informs the defendant of his right of appeal to the supreme court of this Territory, to which judgment and sentence the defendant excepts and exceptions allowed.

C. F. IRWIN, *Judge.*

And afterwards on the same day, the further following proceedings were had in said case, to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN NEW.

Comes now the defendant in person into open court and by his attorneys. And now defendants asks and is given sixty days in which to prepare and serve his case-made for appeal to the supreme court and the Territory is allowed ten days therefrom to suggest amendments thereto, said case made to be settled and signed on five days' notice.

266 TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Certificate.

We hereby certify that the above and foregoing case-made, contains a full, true complete and correct transcript of all the pleadings, motions, orders, evidence introduced, objections made thereto, and rulings thereon, and exceptions saved, and of all of the pleadings and proceedings, filed and had in said cause, of every nature whatsoever, including a copy of the indictment and of the final judgment and sentence in said cause.

HENRY M. FURMAN &
FORREST & LOWE,
Attorneys for the Defendant.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Acceptance of Service.

We hereby accept service of the above and foregoing case-made, in the above entitled cause, this 10 day of Dec. 1901.

T. A. EDWARDS, *Co. Att'y,*
L. R. COWAN,
J. W. SMITH,
M. G. ABERNATHY,
Attorneys for the Territory.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

267 In the District Court for Washita County, Territory of Oklahoma.

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.

Acceptance of Notice for Presentation of Case Made for Signing and Settlement.

We, the undersigned attorneys for the above named Territory in the above entitled case, do hereby consent that the above and foregoing case made may be presented to the Hon. C. F. Irwin, judge of said court, for signing and settlement on the 8th day of January, 1902, at chambers in the city of Guthrie said Territory, hereby waiving further notice of presentation of the same and further notice of the signing and settlement thereof.

Dated this 3rd day of January, 1902.

T. A. EDWARDS,
County Att'y,
L. R. COWAN,
Ass't Co. Att'y,
Attorneys for the Territory.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

268 TERRITORY OF OKLAHOMA, } ss:
County of ——, }

In the District Court in and for Washita County, Oklahoma.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Certificate.

I, C. F. Irwin, judge of the district court above named, do hereby certify that I was the presiding judge at the trial of the above entitled cause in the district court in and for Washita county, Oklahoma Territory; that the above and foregoing case made has been duly served in due time, and that it is true and correct and speaks the truth throughout, and that the same contains a true, full, complete and correct transcript of all the pleadings, motions, orders, evidence introduced, objections made thereto, and rulings thereon, and exceptions saved, and of all the pleadings and proceedings filed and had in said cause of every nature whatsoever, including a copy of the indictment, and instructions given and refused and of the

final judgment and sentence in said cause, and I hereby sign, settle, certify and allow the same as true and correct, and the clerk of said court is hereby ordered and directed to attest the same with his signature and the seal of said court and to file the same of record as the case made in said cause as provided by law.

Witness my hand at the city of —— this 8th day of January, 1902.

C. F. IRWIN,
Judge of the District Court in and for Washita County, Oklahoma Territory.

Attest:
E. M. HEGLER,
[SEAL.] *Clerk District Court, Washita County, Oklahoma Territory.*

Filed this 8th day of January, 1902, E. M. Hegler, clerk dist. crt. Washita county Oklahoma Territory. Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court. By Florence N. Weirick, deputy.

269 Said case-made is endorsed as follows; No. 1210—John T. New *vs.* Territory of Oklahoma. Filed Mar. 18, 1902 Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

270 And on the 18th day of March, 1902, there was filed in said supreme court in said cause, a notice of appeal and proof service same which notice reads in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA, }
Washita County. }

In the District Court.

THE TERRITORY OF OKLAHOMA, Plaintiff, }
vs. } Notice of Appeal.
JOHN T. NEW, Defendant. }

To T. A. Edwards, county attorney of Washita county, and E. M. Hegler, clerk of the dist. court in and for said county:

Take notice that defendant in the above entitled cause, appeals to the supreme court of the Territory of Oklahoma from judgment rendered in said above entitled cause against this defendant on the 19 day of Oct., 1901.

HENRY M. FURMAN,
FORREST & LOWE, AND
MASSINGALE & AUXIER,
Attorneys for Defendant.

I hereby acknowledge service of this notice this — day of —— '02.

——— ———,
Co. Att'y of Washita Co.

I hereby acknowledge service of this notice this 17 day of March, 1902.

E. M. HEGLER,
Cl'k of Dist. Court for Washita County.

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

I received this writ on the 17th day of January, 1902, at 3:25 o'clock p. m. and served the same on the 17th day of January, 1902, by delivering a true copy of the same to T. A. Edwards, Co. att'y, personally, at 3:30 o'clock p. m.

JOHN W. MILLER,
Sheriff of Washita County, Oklahoma Territory.

Fees.

Service.....	$ .50
Copy.....	.15
Total.....	.65c.

271 Said notice is endorsed as follows: No. 1210. John T. New *vs.* Territory. Proof of service of notice of appeal. Filed March 18, 1902, Benj. F. Hegler, clerk supreme court. By Florence N. Weirick, deputy.

272 And afterward, on the 29th day of May, 1902, there was filed in said supreme court a motion to dismiss said cause, which motion reads in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } Motion to Dismiss.

Error from Washita county.

Comes now the defendant in error in the above entitled cause and asks the court to dismiss the appeal in the above entitled action for the reason that this court has no jurisdiction in this case in this, to-wit:

First. The plaintiff in error did not before filing his case-made in this court, serve upon the clerk of the district court and the county attorney representing the Territory, a notice of appeal as is for such cases by statute provided. That if any such notice of appeal was ever as a matter of fact, served upon the said district court clerk and county attorney, that it was at a period later than the time when the case-made was filed in the office of the clerk of this court.

Second. Plaintiff in error asks to dismiss this appeal for the reason that the record does not disclose that any notice of appeal was ever served upon the said clerk of the district court or upon the said county attorney of Washita county.

For which reasons defendant in error asks the court to dismiss this appeal.

T. A. EDWARDS AND
J. C. ROBBERTS,
Attorney General,
For Defendant in Error.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

273 *Suggestions and Authorities in Support of the Within Motion.*

The record must show affirmatively an exact compliance with statutory requirements as to giving and filing notice of appeal.

19 Kansas, 544. The State of Kansas *vs.* Samuel Ashmore—"Appeal in criminal cases. In the absence of any notice of appeal required by section 285 General Statutes 866, the supreme court has no jurisdiction to review the rulings and judgment of a district court in a criminal case."

The facts in the above case show that the alleged offence was committed in November, 1872, Ashmore was found guilty of murder in the first degree and was sentenced to suffer the penalty of death in 1875. On the 14th day of May, 1877, Ashmore, by his counsel, filed in this court a transcript of the record as appeal from such judgment and sentence. Said transcript was certified to by the clerk of the district court. The attorney general representing the State objected to any consideration of the case upon the ground that no notice of appeal appeared in the transcript. The section of the statute referred to is identical with the one which is now in force in Oklahoma. The court held in substance that it had no jurisdiction.

14 Kansas, 446. The facts of this case are best and most concisely shown by a short quotation from the opinion.

"Neitzel was convicted in the police court of the city of Concordia upon a charge of selling liquors without a license, and fined one dollar. He appealed to the district court, where he was again found

guilty, and sentenced to pay a like fine. This judgment he seeks to reverse in this court, and he has brought it here by case made, and petition in error; and the first point made is, that this is a criminal case, and can be brought to this court only by appeal, and by notice to the clerk and attorney. No notice appears in the record and it is well settled that notice to the clerk is essential to perfect the removal of a criminal case to this court for review."

274 People *vs.* Colon, (Cal.) 51 Pac. 1082. Syllabus:

"Where the transcript does not contain a copy of the notice of appeal and does not show that such notice was ever served on the adverse party, the appeal should be dismissed."

In the transcript presented in the supreme court in the above case, there was no notice of appeal set out and the only reference to any such notice was in the certificate of the clerk of the court below attached to the transcript in which he certifies "the foregoing to be a full, true and correct copy of the information," etc., "and also of the notice of appeal duly filed herein." Section 1240 of the Penal Code of California provides "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same and serving a copy thereof upon the attorney of the adverse party." The decision of the court was that inasmuch as this statute had not been complied with, that it had no jurisdiction in the matter and the appeal was consequently dismissed.

All of the authorities are at harmony to the effect that the notice of the appeal and service according to the requirements of the statute shall affirmatively appear in the record and that it would be improper to go *aliunde* for this notice or service. For this point we call attention of the court to the cases cited above, also to Adams *vs.* McPherson, 34 Pac. 1095, the syllabus of which is as follows:

"The record must affirmatively show the service of the notice of appeal on the adverse party or his attorney. Section 4808, Rev. St. 1887, is mandatory and the record must affirmatively show that its provisions have been complied with, to give this court jurisdiction."

The fact that the county attorney accepted service of the case made would not constitute a waiver of service of notice of appeal.—58 S. W. 1038.

275 The fact that the clerk certified to the case made would not relieve the plaintiff in error from serving him with notice of appeal and would not be considered a waiver.—51 Pac. 1082; 19 Kans. 544.

Sections 5330 and 5331 of the Revised Statutes of Oklahoma, 1893, provide in substance that technical errors in perfecting an appeal in criminal cases shall be disregarded. These statutes can have no application to a point of this sort for the reason that the question is jurisdictional, the notice of appeal being at the bottom of the right of this court to hear and determine the cause.

In addition to the cases cited above, I would like to call the attention of the court to some additional authorities upon these points.—

15 N. W. 605; 1 Kans. 331–314; 35 S. W. 27; 25 Pac. 1091; 45 Pac. 564; 42 Wis. 317; 44 Pac. 129; 65 N. W. 984; 63 N. W. 654; 51 N. W. 16.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

276 In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } Acceptance of Service of Motion.

We, the undersigned attorneys for the plaintiff in error in the above entitled cause, hereby accept service of notice of motion to dismiss, of which the within is a true copy.

Witness our hands this — day of —— A. D. 1902.

Served in time,

FORREST & LOWE,
Attorneys for Plaintiff in Error.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Said motion to dismiss is endorsed as follows:

1210—New *vs.* Territory—Motion to dismiss—Filed May 29, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

277 Afterward, on the second day of June, 1902, there *was* filed in said court in said cause, suggestions opposing motion to dismiss, which suggestions read in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

JAMES T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Suggestions Opposing Motion to Dismiss.

The authorities cited by counsel for defendant in error in support of the motion to dismiss do not sustain their contention. These decisions, in so far as they bear upon the question are from Kansas

and Iowa, and the statutes of these two States differ in every material as to the manner and method of appealing from the district to the supreme court in criminal cases. In both these States the cases are taken up by appeal by a bill of exceptions properly allowed and signed.

Gen. Stat. of Kan., par. 5343, 1889, *et seq.* State against McClintock, 37 Kan. 39. State against Carr, 37 Kan. 421. Cases cited by defendant in error from N. W. Rep. are each and all from Iowa.

In these two States the title of the case of appeal is not changed, it remains the State as plaintiff and defendant below as defendant.

In the Territory a criminal case goes up upon a case made, par. 5324, whereby the status of the parties is reversed.

In Kansas and Iowa the bill of exception must be, both allowed and signed before the adjournment of the court in which the conviction was had.

278 In the Territory the party desiring the appeal has one year from the date of conviction, in which to file his appeal in supreme court. Par. 5321.

In the 19th Kansas cited by the attorney general no notice whatever was served, therefore no appeal was pending, the court did not obtain jurisdiction and the proceedings were properly dismissed. The same is true of the case cited from the 14th Kansas. In this case no attempt had been made to serve notice. The question was, whether a conviction for a violation of the city ordinance was a criminal action within the meaning of the crimes act relating to appeals. The court held that it was, and no notice of appeal having been given the court properly dismissed the proceedings.

In the case from California, 51st Pac., the record affirmatively shows that no notice had been served. The court had no jurisdiction and the case was properly dismissed.

The same is true of the Idaho case cited in the 34th Pac. This condition is true of every case cited by counsel for defendant in error.

If the facts of this case were the same as in the cases cited, no attempt to resist the motion would be made, but they are different. The records and files in the action at hearing affirmatively show that notice of appeal was served by the sheriff of Washita county on the county attorney of that county, and that the clerk of the court wherein the conviction was had accepted service of the notice of appeal. If this were not true it would be our contention that the plaintiff in error would yet have the right to perfect the records by giving notice, and that such notice would be a full compliance with the statutes, par. 5321. This contention is borne out by the case cited from Texas, 35 S. W. Rep. The court there say:

"On motion to permit a transcript to be filed, which does not contain notice of appeal, it cannot be presumed that the said notice was given, though the clerk of the court certifies that a motion
279 for a new trial was filed, and a docket entry states that the motion was denied, and the plaintiff appeals, particularly as

the motion was not accompanied by an affidavit stating that the notice was given."

"When a transcript does not contain a notice of appeal, the practice is to perfect the record in the court below, and correct the transcript in the appellate court by certiorari."

The statute is silent as to when the notice of appeal shall be served, par. 5322, while par. 5321 fixes the limit of one year for filing the transcript, which must be prepared as provided in par. 5324.

The statutes of some of the State provides the time within which the notice shall be given, not so in Oklahoma. The limit of time here, if there is a limit is one year, "after the rendition of the judgment,"—that is in which to file the case made. The case made may be filed at any time before the expiration of the one year and the notice of appeal can properly be served at any time after filing and within the year and the appeal is properly taken. A motion to dismiss ought not to be entertained until after the expiration of the year.

The notice of appeal is no part of the case made. It is no more necessary to attach it to the case made than it is a summons in error in a civil action. Both are jurisdictional and if the whole record shows the court to have jurisdiction the court will not dismiss.

The supreme court of Kansas in Shumaker vs. O'Brien, 19 Kan., 476, has fully defined a case made and what it should contain and clearly distinguished it from a bill of exceptions, and defined the latter.

1. "The office of a bill of exceptions, and of a case made is very dissimilar. The object of the former is generally to bring upon the record for review a decision of the court upon a matter of law, which the record would not otherwise show, and it must be reduced to writing, allowed, signed, and filed at the term the decision
280 complained of is made. After being signed, filed and made a part of the record of an action, it can be presented to the supreme court in the transcript of the case.

2. "The object of a case made is to present to the supreme court complete in itself, a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to bring to the notice of this court the errors complained of. It must embrace and include all that is necessary for a full understanding of the questions submitted for decision, regardless of the fact whether the exceptions are entered of record. It may be settled, signed, and filed beyond the trial term, and in vacation, upon the order and within the time allowed by the trial court or judge."

If reason, the decisions above referred to, the statute, par. 5322 do not settle this question in favor of the contention of the plaintiff in error, that the notice of appeal forms no part of the case made but that it is sufficient if it appears from the record that such notice was given, the question is forever put at rest by the decision of this court in 9th Okla. 462, Bailey vs. Territory, where this court says:

"An appeal is a right conferred by the organic act, but the matter of perfecting an appeal is a matter of statutory regulation. The criminal procedure act makes specific and definite provision for the mode of taking appeals in criminal causes. So far as appears from the record in this case, no effort has been made to comply with those statutory directions. An appeal by the defendant in a criminal cause is taken by the service of a notice upon the clerk of the court where judgment was entered, stating that the appellant appeals from the judgment, and by the service of a similar notice upon the county attorney.

The appeal is completed by filing a petition in error with a case made, or duly certified transcript of the judgment and proceedings in the cause, attached to such petition in error. In either case the notices served upon the clerk and county attorney, with proof
281 of service, should be filed with the record in this court, or duly authenticated copies filed in lieu thereof."

The cases cited from the Pac. Rep. are each and all of them to the same effect as the cases cited from Kansas and Iowa.

In 44 Pac. Rep. the court say: "Where the *record* fails to show that notice of appeal was given, the appeal will be dismissed."

The case cited in the 44 Pac. is to the same effect. There the court say: "But no bill of exceptions appears in the record, *and no service of notice of appeal was made* upon the plaintiff or his attorney."

In the case cited from 25 Pac. the court say: "The record of a case on appeal must affirmatively show that notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney within the time required by the statute."

The record in the case at bar shows that these requirements of the statute necessary to confer jurisdiction have been complied with. The case cited from 1st Kansas is to the same effect. The Wisconsin case we have not had an opportunity to examine but feel that it must be and is in harmony with all the authorities, to the effect that notice of appeal must affirmatively appear somewhere in the record, and if it does it is sufficient. That it does in this case is beyond question. We might here suggest that Judge Strang, the predecessor of the attorney general, accepted services of the brief of the plaintiff in error and thus waived jurisdiction so far as it is in the power of the Territory to do.

The motion should be overruled for the following reasons:

First. It is not necessary or even proper to attach the notice of appeal to the case made. It forms no part of it.

Second. The defendant below having one year to file his transcript or case made has the same time under the statute to serve his notice of appeal.

282 Third. The record shows proper service and acknowledgment of notice of appeal.

H. M. FURMAN AND
FORREST & LOWE,
Attorneys for Plaintiff in Error.

Endorsed: 1210—John T. New, plaintiff in error, *vs.* Territory of Oklahoma, defendant in error—Suggestions opposing motion to dismiss—Filed June 2, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

283 Afterward, at the June, 1902, term of said supreme court, on the third day of June, 1902, the following proceeding was had in said cause:

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } #1210.

Comes now R. B. Forrest and Henry Furman, of counsel for plaintiff in error, and J. C. Robberts, attorney general, for the Territory, and make oral argument herein. And cause is submitted, with fifteen days to the Territory for briefs.

284 And thereafter, at the June, 1902, term, of said supreme court, on the second day of September, 1902, the following proceeding was had in said cause, to-wit:

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } #1210.

And now this cause comes on for final consideration by the court upon the record, oral argument and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error. To all of which plaintiff in error excepts.

Opinion by Pancoast, J. All the justices concurring, except Irwin, J., who presided in the trial of the cause below, not sitting, and Beauchamp, J., absent.

Which said opinion reads in words and figures as follows, to-wit:

285 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed September 2, 1902.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Syllabus.

1. *Murder—Justifiable Homicide—Instruction.*—On the trial of a cause, where the defendant is charged with murder, and the evidence of the prosecution tends to support the charge, and there is no evidence tending to support the lower crime of manslaughter, in either degree, but the evidence of the defendant tends to prove justifiable homicide it is not necessary for the court to instruct the jury upon the law of manslaughter, in either degree.
2. *Instructions—Should Run to Facts and All Proper Deductions and Interpretations of Them.*—The instructions in all cases should run to the facts, and to all proper deductions and interpretations of them, and not to questions not presented or covered by the evidence.
3. *Variance—Instruction Refused, Not Error.*—In a prosecution for murder, where the indictment charges the death to have been caused by a gunshot wound, and the evidence shows that the deceased was shot with a Winchester rifle, in the side of the face, the ball tending downward and coming out through the neck on the opposite side, penetrating and lodging in the shoulder, the gun from which the ball was shot having been held within a very short distance of the deceased at the time the shot was fired, and the evidence also shows that after the shot was fired the defendant struck the deceased over the head with the gun, crushing the skull, and where the only evidence that death was not caused from the gunshot wound, as alleged in the indictment, was that of a physician who testified, as an expert witness, that he could not tell whether death was caused by the gunshot wound or by the
286 blow on the head, but that either might have caused the death, it is not error for the court to refuse to give an instruction that if the jury, from the evidence, entertain a reasonable doubt as to whether the deceased died from the effects of the gunshot wound or from the effects of the blow on the head, that then it was their duty to acquit the defendant.

4. *Verdict Sustained by the Evidence—No Material Error on Trial.*—Where after an examination of the entire record, it appears that the defendant has had a fair and impartial trial, and that no material error has been committed by the trial court, and the verdict seems to be amply sustained by the evidence, this court will not disturb the verdict or judgment of the trial court.

Error from the district court of Washita county.—Clinton F. Irwin, trial judge.—Affirmed.

Henry M. Furman, Forrest & Lowe, Massingale & Auxier, and Culp, Giddings & Giddings, for plaintiff in error.

J. C. Robberts, attorney general, T. A. Edwards, county attorney, and J. W. Smith, for defendant in error.

The plaintiff in error, John T. New, was indicted by a grand jury of the district court of Washita county, on the charge of murder, and tried and convicted at the May, 1901, term, and sentenced to imprisonment at hard labor in the penitentiary for life. Exceptions were saved to certain rulings, a motion for a new trial filed and overruled, and the case brought to this court for review.

287 *Opinion of the Court by Pancoast, J.*

The errors assigned are grouped under three heads, and we will consider them in the order assigned in plaintiff's brief. First, error in neglecting to instruct the jury as to the different degrees included in the charge, murder and manslaughter. The question is squarely raised here whether it is necessary in all cases of trials for homicide to instruct the jury not only upon the question of murder, but also upon the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter.

We think the law is definitely settled that where the evidence tends to prove only the higher, and does not tend to prove the lower, offense, it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of the lower offense Gatliff *v.* Territory, 2 Okla. 523; State *v.* Estepp (Kan.) 24 Pac. 986. And the rule is just as well settled, that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense which the evidence tends to prove:—Lawson *v.* Territory, 8 Okla. 1. The only question, then, is to determine which one of these two rules applies in this case.

By section 2078 of the Statutes of 1893, homicide is defined to be murder:

"When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being."

By section 2086 of the Statutes of 1893, homicide is made manslaughter in the first degree:

"When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

288 It is the province of the court to determine whether there is or is not any evidence which tends to prove the lower degree of crime, and when the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury, if requested, upon such lower degree. To apply the rule, we must consider the defendant's testimony, as upon this alone can there be any claim of manslaughter.

Just prior to the difficulty, the deceased, with one Walter A. Reeves, was traveling in a wagon along the public highway, going towards his residence. The defendant was at work fixing a wire fence at or near a gate, and also near the intersection of two public highways, or a "cross roads." The defendant states that he had taken his Winchester rifle to go down by a ravine or creek to shoot ducks, and, coming to the section line, near the road, he saw a steer out in the road, drove him in and proceeded to fix up the fence. As he was at work he saw the deceased and Reeves some distance away, in the road. They were in a wagon, sitting on chairs, and driving two loose horses ahead. That he kept on working, and looked up a second time when the deceased and Reeves were about forty or fifty yards distant. That at that time he saw Doyle, the deceased, reach his hand into his bosom and begin to jerk at something which the defendant says he supposed was a pistol. That he then, just reached down and picked up the Winchester and fired. That his wife had told him that the deceased had made threats, and said that if things kept coming the way they were that he was going to kill the defendant. That there had been some hard feelings between the two, but that they had never had any serious trouble. That he fired the first shot because he was afraid the deceased would kill him. That this fear was caused by the threats, and the fact that he saw the deceased reaching into his bosom. That as he fired the first shot, the deceased and Reeves jumped out of the wagon, on the opposite side. The defendant could only see their heads when he shot the second time. That he

289 kept along with the wagon for some distance, until the team ran away and passed him, when the two, deceased and Reeves, were in plain view, and the defendant then fired two or three more shots. That Doyle, the deceased, was working at his breast trying to get his pistol out. Reeves turned and ran west. That when Doyle had run to the distance of something like one hundred yards from the defendant, he, the defendant, quit shooting, and Doyle stopped running and turned and looked back, and commenced working at his breast again like he was trying to get his pistol out. The defendant then rested the gun on a post, took aim, and shot Doyle. Doyle kept running. The defendant

thought the last shot had struck the deceased, as he threw his hand down on to his leg. The deceased kept running, and got through the fence into the place of one Trotter, some distance away, and went into Trotter's house. The witness Trotter states that as Doyle came through the fence, he, the deceased, said "Do not let him kill me." New, the defendant, was then running down and along the fence, inside of his pasture. Doyle, still holding his leg, was running for the house. He did not stop. Trotter went out, to stop New as he was getting over the fence. He met the defendant in the road and said to him, "John, this will never do," and New said, "God damn you, turn me loose," and he jerked loose and followed Doyle. Trotter overtook the defendant at the house, and, assisted by his wife, again tried to stop him. Upon his promising that he would not shoot Doyle in the house, they let the defendant go. Doyle had gone into the house, and into an inner room. New went into the house and found Doyle sitting on the floor behind the door. He opened the door and shot him again, the shot taking effect in the side of the face, going through and coming out at the neck on the opposite side, and lodging in the shoulder. After the defendant fired this shot, he struck the deceased over the head with the gun.

The above includes the entire evidence of the defendant, covering the period of the difficulty. Where in it can we find any-
290 thing that tends to reduce the crime to manslaughter? The first of the three definitions of manslaughter in the first degree, as laid down in the statute, is where the homicide is "perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor." This paragraph cannot apply, because the defendant was not engaged in the commission of a misdemeanor, and it cannot possibly be said that there was no design to effect death.

The second paragraph of the law of manslaughter in the first degree, is where the homicide is "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide." Neither can this provision apply, because it cannot be said that the homicide was perpetrated without a design to effect death. The evidence directly shows that there was a design to effect death.

The third paragraph of the section defining manslaughter in the first degree is where the homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." This is the provision of the law which the plaintiff in error claims applies in this case, and the one which it is claimed the court failed to cover by proper instruction. It will be noticed that the only testimony which it is claimed has a bearing on this subject, and makes this provision of the law of manslaughter applicable, is that of the defendant himself, that when he looked up and saw the deceased forty or fifty

yards distant, he was in the act of putting his hand inside of his clothing in a manner which made the defendant think he was
291 attempting to draw a revolver. Now, if the act of the deceased was sufficient to justify the defendant in this belief, in other words, if the act of the deceased was such as to make a reasonable man believe that he was in imminent danger of his life or great bodily harm, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting? That is the principal element of this third subdivision of the law of manslaughter in the first degree. That is, the homicide must have been perpetrated unnecessarily. And of course the homicide must have been perpetrated not only unnecessarily, but without premeditation or design.

Where the evidence of the prosecution shows the killing to have been murder, and the evidence of the defendant tends to show the killing to have been justifiable, it is only necessary that the instructions of the court should cover the law of the case as shown by the evidence.—State *vs.* Hendricks, (Kan.) 4 Pac. 1050; People *v.* Lee Gam, (Cal.) 11 Pac. 183; Territory *v.* Baker, (N. M.) 13 Pac. 30; State *v.* Reed, 117 Mo. 604; State *v.* Fairlamb, 121 Mo. 138; State *v.* Kilgore, 70 Mo. 546.

The instructions in all cases should run to the facts and to all proper deductions and interpretations of them, and not to questions not presented or covered by the evidence. State *v.* Rhea, 25 Kan. 581;

Viewing the evidence of the defendant alone, from its most favorable standpoint, only one of two conclusions could have been arrived at by the jury. First, if the case for the prosecution was made out, the verdict must have been for murder. If the theory of the defendant was sustained, then the homicide was justifiable. As we view the defendant's testimony, from the record, however, taking it as a whole, and particularly the acts of the defendant from
292 the beginning of the shooting until the end, we do not see how the jury could have arrived at any other conclusion than that the defendant was guilty of murder, even if the acts of the defendant at the beginning of the shooting, separated from the latter part of the difficulty, could have been deemed justifiable, yet his following up the deceased, his deliberate shooting by laying his Winchester rifle across a fence post, and his continued following up and continued shooting at the deceased after he was wounded, and while he was fleeing and the vicious manner in which he spoke to Trotter when Trotter tried to persuade him to desist, the pursuing of the deceased into the inner room of the house, whence he had fled for safety, and the deliberate manner in which he entered the room and shot the deceased, all show a viciousness of mind for which there is not excuse whatever, and which must have impressed the court and jury with the fact of a premeditated design of the defendant to kill the deceased, and which cannot be held to tend to show that the homicide was perpetrated unnecessarily either while resisting an at-

tempt by the person killed to commit a crime, or after such attempt had failed.

In the case of Lawson *v.* Territory, 8 Okla. 1, cited by counsel, there was a personal difficulty between the defendant and the deceased at the immediate time of the homicide, of a character which made the question as to which was the aggressor a material one. Notwithstanding that, however, the court instructed the jury that there was no evidence to support or justify a verdict of manslaughter in the first or second degree or of excusable homicide, and that the verdict must be either for murder, as charged in the indictment, or that the homicide was justifiable, and the defendant was not guilty. In the case at bar there was no instruction upon this point. The instructions of the court simply covered the law of murder. Nor did the defendant ask for any instructions
293 covering the law of manslaughter to any degree. We think the plaintiff in error has not properly raised this question. If the defendant was entitled to instructions upon this point, he should have asked the court below to instruct the jury upon the law of manslaughter, and in the absence of such a request it was not error for the court to omit to give such instructions. It is true that the court should instruct the jury upon all material questions involved in the case, but when the court has covered the case with general instructions, it is not error to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when the defendant has not asked for such instruction.—Lovett *v.* State, 30 Fla. 102; Kelley *v.* People (Col.) 29 Pac. 805; State *v.* Estop, (Kan.) *supra;* State *vs.* Hendricks, 4 Pac. 1050.

The second error alleged is the refusal of the court to give instruction number 5, requested by the defendant. In arguing this proposition, counsel for plaintiff in error fall into a very grave error. They argue the question upon the theory that the testimony of Dr. James McLain was the only evidence offered upon the question as to what caused the death of the deceased. While it is true that this witness stated that he could not tell whether death was caused by the gunshot wound or from the blow on the top of the head, yet it does not follow that the jury could not have found from other evidence what caused the death of the deceased. Either of the two wounds was fatal. The gunshot wound was such that it did not require an expert to show its character or effect. The instruction asked was misleading, when applied to the evidence, and was properly refused.

294 We see no error in instruction number 15½ on page 228 of the record. It might be a question whether the instruction was necessary at all under the evidence of the case, and was evidently only given because of the statements of the defendant that he was afraid that the deceasad would kill him, and this instruction was given for the purpose of covering this branch of the case, so that the jury would not be misled in the event they believed that

the killing was done by reason of the cowardice of the defendant, or in other words, through fear that amounted to cowardice. It was evidently not given in order to have the jury understand that any degree of courage or cowardice on the part of the defendant could in any way influence the action of the jury in determining the guilt or innocence of the defendant. In fact, it was given for the very purpose of telling the jury that cowardice on the part of the accused should not influence their action.

This concludes the argument of all the errors assigned, although instruction number 17, as given by the court, is among the assignments. This instruction, however, is so manifestly correct, and is so applicable to the evidence of the case, that we cannot think counsel seriously question its correctness. There is no question but that the fatal shot was the one last fired, when the deceased was in the inner room of Trotter's house, where he had retreated from the defendant and was at the time making no demonstration, nor could he have been making any demonstration of which the defendant could have had any knowledge, because he was in an enclosed room, and the defendant could under no circumstances have believed at that time that the deceased was about to, or could, do him any bodily harm. Nor could he have believed that he was at the time in any immediate or apparent danger of death or bodily harm at the hands of the deceased, and to instruct that under such circumstances
295 the killing of a human being is not justifiable on the ground of self defense, is not error.

Instructions numbers eighteen and nineteen are along the same line, and were necessary to fully cover the proposition treated of. They were not only fully warranted by the evidence, but were warranted by the evidence of the defendant alone. By omitting them the court would have failed to cover the entire law of the case.

We have examined the entire record. The instructions were fair, and ample to cover all questions presented by the evidence. We see no error in the record, and, believing the accused to have had a fair and impartial trial, and that a correct verdict was arrived at, the judgment of the court below must be affirmed. All the justices concurring, except Irwin, J., who tried the case below, not sitting, and Beauchamp, J., absent.

296 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 295 pages, numbered from 1 to 295, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in

error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 6th day of October, 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

297 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, between John T. New, plaintiff in error and The Territory of Oklahoma, defendant in error, a manifest error hath happened, to the great damage of the said John T. New as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, the 24th day of February, in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

298 [Endorsed:] I acknowledge service of a copy of this writ on me this 29th day of February 1904. Benj. F. Hegler, clerk of the supreme court of Territory of Oklahoma. And in compliance therewith I certify and transmit to the Supreme Court of the United States a complete copy of the record in case of John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Benj. F. Hegler, clerk of the supreme court.

299 UNITED STATES OF AMERICA, ss:

To the Territory of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of Oklahoma wherein John T. New is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

300 On this 1st day of March, in the year of our Lord one thousand nine hundred and four, personally appeared before me, the subscriber, Charles E. Carpenter, sheriff of Logan county, Oklahoma Territory, and makes oath that he delivered a true copy of the within citation to Thompson B. Ferguson, as governor of the Territory of Oklahoma, on March 1st, 1904.

Sworn to and subscribed the 1st day of March, A. D. 1904.

[Seal Probate Judge, Logan County, Okla. Ter.]

C. A. GOODRICH,
Probate Judge.

[Endorsed:] No. —. John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Citation and proof of service. John J. Weed, attorney for pl't'ff in error.

301 In the Supreme Court of the United States.

JOHN NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error.

It is hereby stipulated and agreed that pages 54 to 158 of the record in the above cause, which refers to the testimony of jurors on *voir dire*, may be omitted by the printer from the record and may be eliminated from the record in the above cause.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.
P. C. SIMONS,
Attorney General, Attorney for Defendant in Error.

302 [Endorsed:] File No. 19301. Supreme Court U. S. October term, 1904. Term No. 226. John T. New, pl'ff in error, vs. The Territory of Oklahoma. Stipulation to omit parts of record in printing. Filed Aug. 29, 1904.

Endorsed on cover: File No. 19,301. Oklahoma Territory supreme court. Term No. 226. John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Filed April 19", 1904. File No. 19,301.